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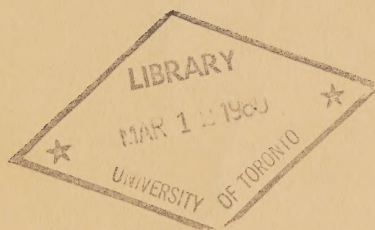
Government
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Commission on Freedom of Information and Individual Privacy

Freedom of Information and the Policy-Making Process in Ontario



FREEDOM OF INFORMATION AND THE POLICY-MAKING PROCESS IN ONTARIO

Prepared for the
Commission on Freedom of Information
and Individual Privacy

February, 1980.



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FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;
2. The individual's right of access and appeal in relation to the use of government information;
3. The categories of government information which should be treated as confidential in order to protect the public interest;
4. The effectiveness of present procedures for the dissemination of government information to the public;
5. The protection of individual privacy and the right of recourse in regard to the use of government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

(iv)

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 13. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn by having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

One of the most sensitive issues to be addressed by this Commission is the question of access to government information pertaining to the formulation of governmental policy. Advocates of a more open system of government claim that greater public access to documents generated by that process -- task force reports, briefs, consultants' studies, Cabinet minutes and related documents, draft legislation and regulations, working papers, etc. -- would usefully subject this important process to public scrutiny and might facilitate greater participation by the public in the development of policies affecting them. On the other hand, many who feel reservations about the adoption of freedom of information laws see this particular area of activity as one which might be dislocated and undermined in a manner contrary to the public interest by the enactment of a freedom of information scheme. More particularly, such observers commonly express concern that freedom of information legislation based on American and Swedish models might conflict with important constitutional conventions of the parliamentary system, such as the doctrines of individual and collective ministerial responsibility.

The purpose of this research paper is to provide a foundation on which a fruitful assessment of these difficult questions can be made. "Policy-making" is, of course, a rather widespread phenomenon in governmental activity. The discussion in this paper is confined to the most central policy-making processes of the government of Ontario, those leading ultimately to a decision by the Cabinet. The structure and operation of the central institutions involved in this process are described. An account is given of the principal individuals or "actors" involved in the process. As well, the paper contains a report of five case studies undertaken with a view to examining the actual documents generated by typical policy-making exercises and ascertaining the level of access accorded to them under present policies and practices of the Ontario government. Finally, the author offers an analysis of what appear to be the most important issues involved in fashioning a disclosure scheme for policy-making materials.

The issues raised in the paper are obviously contentious ones. The author has performed a useful purpose in establishing a factual background and a framework of analysis which should, at the very least, sharpen the focus of debate for those who disagree with the author's views.

As with other Commission research projects, of course, the subject matter is in a state of more or less constant evolution. Thus, since the preparation of the factual portions of this paper, Intergovernmental Affairs has been severed from the Ministry of Treasury, Economics and Intergovernmental Affairs. We are not aware of any developments, however, which constitute a significant departure from the account offered by the author.

(vi)

Readers interested in the subject of this paper may also derive assistance from a companion paper, currently in the final stages of preparation, which gives an account of the impact on policy-making activity of freedom of information schemes in force in Sweden and the United States, as well as that which has been proposed by the federal government of Australia.

The author of the present paper, Mr. John Eichmanis, was a member of the Commission's research staff for the past 20 months. Mr. Eichmanis studied at the University of Toronto and did post-graduate work in political science at the London School of Economics and Political Science. He has recently accepted a position with a Standing Committee of the Ontario Legislature.

Mr. Eichmanis was assisted on this project by M.J. Sabia, a graduate student at Yale University, who prepared a first draft of the description of the budgetary process (Chapt. IV, E) and Francine Latremouille, a recent graduate of the University of Toronto, who undertook many of the interviews on which Chapter V is based. In addition, grateful acknowledgement must be made of the assistance provided by Hugh R. Hanson, who offered many useful suggestions with respect to the conduct of the research and edited parts of an early draft of the report. Mr. Hanson, author of Commission Research Publication 6 (Access to Information: Ontario Government Administrative Operations) was, at the time of this work, engaged in a consulting practice in Toronto. He is currently a member of the Minister's staff in the federal Department of External Affairs. Finally, the generous assistance of Professor G.J. Szablowski of York University should be acknowledged. Professor Szablowski gave freely of his time to provide advice to the author and supplied various materials which were of assistance in the preparation of this paper.

The Commission has resolved to make available to the public its background research papers in the hope that they might further stimulate public discussion. It should be emphasized, however, that the views expressed in this paper are those of the author and do not necessarily represent the views of the Commission.

Particulars of other research papers which have been published to date by the Commission are to be found on pages 168-169.

John D. McCamus
Director of Research

FREEDOM OF INFORMATION AND THE
POLICY-MAKING PROCESS IN ONTARIO

Table of Contents

CHAPTER I	INTRODUCTION	1
	A. Definition of Public Policy-Making	3
	B. Methodology	6
	C. Plan of the Report	7
CHAPTER II	THE GENERAL STRUCTURE OF THE POLICY-MAKING PROCESS: THE COGP REFORMS	9
	A. Policy-Making Structures as Recommended by the COGP	11
	B. The Policy-Making Process as Envisaged by the COGP	18
CHAPTER III	ACTORS IN THE POLICY-MAKING PROCESS	23
	A. The Cabinet Office and the Premier's Office	24
	B. Policy Ministers	27
	C. Cabinet Ministers	28
	D. Deputy Ministers	31
	E. The Relationship Between Ministers and Civil Servants	33
	F. Advisory Bodies	38
	G. Consultants	44
	H. Media	46
	I. Members of the Legislature	48
	J. Organized Interest Groups	51
	K. The General Public	56
CHAPTER IV	AN OVERVIEW OF THE POLICY-MAKING PROCESS IN ACTION	59
	A. The Ministry Level	62
	B. The Cabinet Level	68
	C. The Legislative Level	78
	D. The Budgetary Process	89
	E. Opportunities for Public Participation	96

Table of Contents (cont'd)

CHAPTER V	AN EXAMINATION OF POLICY DOCUMENTS: FIVE CASE STUDIES	102
	A. Development of Bronte Creek Provincial Park	103
	B. Amending the Crown Timber Act	112
	C. Amendment of the Niagara Parks Act	118
	D. Creation of a Unified Family Court	121
	E. Amendment to Age of Majority	123
	F. Conclusions	129
CHAPTER VI	THE DISCLOSURE OF POLICY-MAKING MATERIALS: ISSUES AND ANALYSIS	130
	A. Accountability	131
	B. Public Participation	134
	C. Preferential Access	136
	D. Ministerial Responsibility	137
	E. Frank Advice and Civil Service Anonymity and Neutrality	140
	F. Cabinet Documents	143
	G. Facts and Opinions	149
	H. Financial Information	153
	I. Budget Secrecy	154
	J. Information Relating to Intergovernmental Affairs	156
	K. Legal Advice	159
	L. Submissions, Briefs or Letters	161
	M. Public Opinion Polls	162
	N. Consultants' Reports	163
CHAPTER VII	CONCLUSIONS	165

CHAPTER I

INTRODUCTION

The tradition of administrative secrecy which we inherited as part of the parliamentary system from Britain has certainly encouraged suspicion of government ... Secrecy leads to distrust and fear on the part of the public, and there have been numerous examples of the unfortunate results this can have ... As the size of the public service grows and as the element of secrecy persists, the citizen is asking quite correctly not only what decisions are being made but how they are being made ... Our understanding of decision making will be enhanced if we know more about the circumstances that surround those decisions.

1

The question under examination in this report is the extent to which the tradition of secrecy that surrounds the process of governmental policy-making can be altered. More specifically, it will be asked whether the documents created by that process can or should be made publicly accessible. The report assumes that greater public access to government information is desirable for its own sake in a democratic society. There are those who would go further to argue that compelling reasons exist why openness would strengthen our

1 H. Ian MacDonald, "Evolving Patterns of Government Organization," Queen's Quarterly, 83, no. 3 (1976) 461.

democratic institutions at this point in history.² Whatever may be our motives for taking a positive attitude toward the issue, we can concur with Professor Donald Smiley's observation that greater access to government information "is now on the agenda of most of the Western democracies."³ Debate on the fundamental question of whether there should be freedom of information has been largely resolved; what remains for those contemplating legislation in this area is the question of what degree of access is consistent with our political traditions and principles.

It would not be unfair to say that no other activity of modern government is so surrounded by secrecy as the way in which governments make policy decisions. Nonetheless, journalists, political commentators and academics have attempted to describe and analyze that process. Some research projects on these subjects have taken years to complete. Intensive and extensive research of this kind could not be attempted here. The necessary time and resources were simply not

2 The extent to which we are witnessing an attack on democratic institutions is explored by M.J. Crozier, S.P. Huntington, and J. Watanaki, The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission (New York, 1975).

3 Donald V. Smiley, The Freedom of Information Issue: A Political Analysis (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 1, 1978) viii; for a comparative review of those countries that have passed laws on public access, see Donald C. Rowat, Public Access to Government Documents: A Comparative Perspective (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 3, 1978).

available. What will be offered, therefore, will be more modest in scope; yet the aim is to provide the reader with a reasonably comprehensive overview of how policy decisions are made within the Ontario government. With such an overview it is hoped that reasonable assessments can be made as to the kinds of documents that can be made publicly accessible without harm being done to the process itself, or without undermining the more important conventions of our Westminster-style parliamentary system.⁴

A. Definition of Public Policy-Making

Before proceeding, it may be useful to come to some general understanding of what we consider, for the purposes of this report, to constitute public policy-making. Since many definitions exist in the literature, we shall have to be arbitrary to some degree. We start with fundamentals. The Concise Oxford Dictionary (new ed.) defines public in the following terms: "of or concerning the people as a whole, done by or for, the people, open or shared by the people, of or engaged in the affairs or service of the people," and it defines

4 The two conventions most directly affected by freedom of information are collective and individual ministerial responsibility. The latter convention as it relates to freedom of information has been explored by Kenneth Kernaghan in his paper, Freedom of Information and Ministerial Responsibility (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 2, 1978).

policy as a "course of general plan or action [to be] adopted by the government, party or person." Run together, these meanings have produced a variety of definitions. For our purposes, the following definition will be used: public policy is "a course of action deliberately selected by public officials to bring some intended results upon a given population or environment."⁵ This definition emphasizes the fact that public policy-making is a deliberative process that requires public officials — civil servants and elected politicians -- to make judgments as to alternative courses of action, a process then that takes some time, involves a series of related decisions, and requires information to be gathered and analyzed. At the same time, the process is both extensive and intensive as to the variety and scope of officials involved and the quality of information that forms the basis of the policy. In structural terms, the process operates within what has been called the "executive-bureaucratic arena";⁶ that is, it requires the participation of civil servants and elected politicians, either acting separately or together. This definition also emphasizes that a given policy seeks to affect a significant portion of the population or environment.

5 T. Uno, The Contents of Public Policy, paper presented to the Annual Meeting of the Canadian Political Science Association (May-June, 1976) 9.

6 For a further discussion of this term see G. Bruce Doern and Peter Aucoin, eds., The Structures of Policy-Making in Canada (Toronto, 1971).

Undoubtedly there are a great variety of policies that can be placed on a hierarchic scale of importance and impact; however, whether all of these policies can be classed as public, under our definition, is open to question. Thus, various administrative policies dealing with personnel, accounting and internal organization would fall outside the public policy framework developed here, though admittedly policies developed on these matters could have an effect on public policy under our definition. Also excluded are policies initiated by various regulatory agencies, which while implemented by public officials and perhaps involving a significant sector of a population, would not necessarily receive the attention of the responsible minister.⁷ This is not to say, of course, that policy initiatives ultimately considered at the ministerial level cannot come from this source. Not to be overlooked is the possibility that a policy may take a negative form; that is, it may result in a decision not to proceed with a course of action.

In order to achieve policy objectives, governments employ a variety of policy instruments. The more important are Acts of Parliament, regulations or other statutory instruments, policy statements, memoranda, departmental practice, and even the manner in which a minister or public authority settles an individual problem or case.

7 Ontario agencies, boards and commissions are dealt with in a paper by Larry Fox, Freedom of Information and the Administrative Process (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 10, 1979).

B. Methodology

The first major step in our study was to describe the actual policy-making process of the government of Ontario. To do this, we made an extensive search of the available literature, followed by interviews with a large number of senior civil servants. In many instances the interviews took the form of reviewing step-by-step what had happened during the course of developing specific government policies in the recent past.

For a few of the decision-making case studies undertaken, a thorough examination of the relevant files was made. This allowed us to give readers a description of the types of documents held in government policy files. Although the sample chosen was not large, it should suffice to give examples of most of the issues regarding public access that arise in regard to all policy files. For each of the documents examined, an attempt was made to determine what policy, if any, currently guides responses to requests from the public for access. Inquiries were also made about the possible implications of making access to these documents more readily available than it now is.

This study also included an extensive review of the literature in the field of freedom of information and a review of legislation and draft legislation of other jurisdictions and of submissions to the Commission.

C. Plan of the Report

Chapters II, III and IV offer a general and descriptive account of the policy-making process of the Ontario government. Because of its seminal importance in influencing the process as it now exists, the Report of the Committee on Government Productivity provides a starting point for this discussion.

Chapter II outlines the COGP's recommended reforms, particularly as these relate to the Cabinet committee system. Chapter III seeks to identify some of the principal participants or actors in the process and to indicate, in a general and necessarily superficial way, something of their relative importance and influence on the policy process. Chapter IV describes the policy process from its initial stages at the ministry level through Cabinet and the Ontario Legislative Assembly, and seeks to show the complexity of that process, the role that information plays in it and the opportunities for public participation in or influence on policy formulation.

Having offered a general description of the process, Chapter V then turns more specifically to an account of the kinds of documentary material produced by the process in action. This is accomplished in a series of five case studies of typical instances of policy-making. The documents generated in each instance are described, as well as existing policies, if any, with respect to access to those documents.

Chapter VI raises briefly in turn the various arguments for and against access to specific types of policy documents. The freedom of information proposals of some other jurisdictions relating to these questions is briefly described.

Finally, Chapter VII draws some general conclusions and offers general recommendations for the development of a freedom of information policy relating to the policy-making process in Ontario.

CHAPTER II

THE GENERAL STRUCTURE OF THE POLICY-MAKING PROCESS: THE COGP REFORMS

The public policy-making process is a highly complex one, involving many people inside government and often many outside. It requires that political and social values be weighed, economic resources allocated, and new policies and programs reconciled with those already implemented. It necessitates the gathering and analyzing of information, the formulation of alternatives and the assessment of a wide variety of implications. Finally, it demands that at the end of the process a decision be made.

In contemporary Westminster-style parliamentary democracies, the Cabinet is at the centre of this policy-making process. All major policy decisions are taken by ministers collectively sitting in Cabinet. No attempt will be made here to describe the historical process which has led to the emergence, in the past century, of the Cabinet as the essential agency of governmental initiative.⁸ The formal power of

8 In the Ontario context, this has been explored by F.F. Schindeler, Responsible Government in Ontario (Toronto, 1969); also see Kenneth Bryden, "Cabinets," in D.J. Bellamy, J.H. Pammett and D.C. Rowat, eds., The Provincial Political Systems (Toronto, 1976).

Cabinet, of course, is pervasive. The sovereign, in Ontario the Lieutenant Governor, acts on the advice of Cabinet in exercising prerogative powers. In the context of majority government, the Cabinet can, for the most part, impose its will on the legislature. Further, enacted legislation drafted in the first place under Cabinet supervision will often confer extensive powers on the Cabinet to flesh out the bare bones of legislative schemes by the promulgation of detailed regulations.

Below Cabinet are the individual departments or ministries, organized along functional lines, headed by a minister responsible for administering programs and services. In addition to these administrative functions, ministry officials are obliged to provide information, analysis and advice in support of their minister's participation in the policy-making process. Much of what takes place in this process consists of resolving the conflict of values and objectives that invariably exist between one ministry and others, and between what ministers themselves and ministry officials perceive as the correct solution.

To improve the methods by which these conflicts can be resolved so that better decisions can be made, governments at the federal and provincial levels have, in the past decade, developed sophisticated procedures and organizational structures. We turn now to describe the recent implementation of structural reforms in the government of

Ontario, resulting from the recommendations of the Committee on Government Productivity.

A. Policy-Making Structures as
Recommended by the COGP

The present policy-making structures in the Ontario government date from the implementation of the recommendations proposed by the Committee on Government Productivity in the years 1969-73.⁹ (See Figure 1).

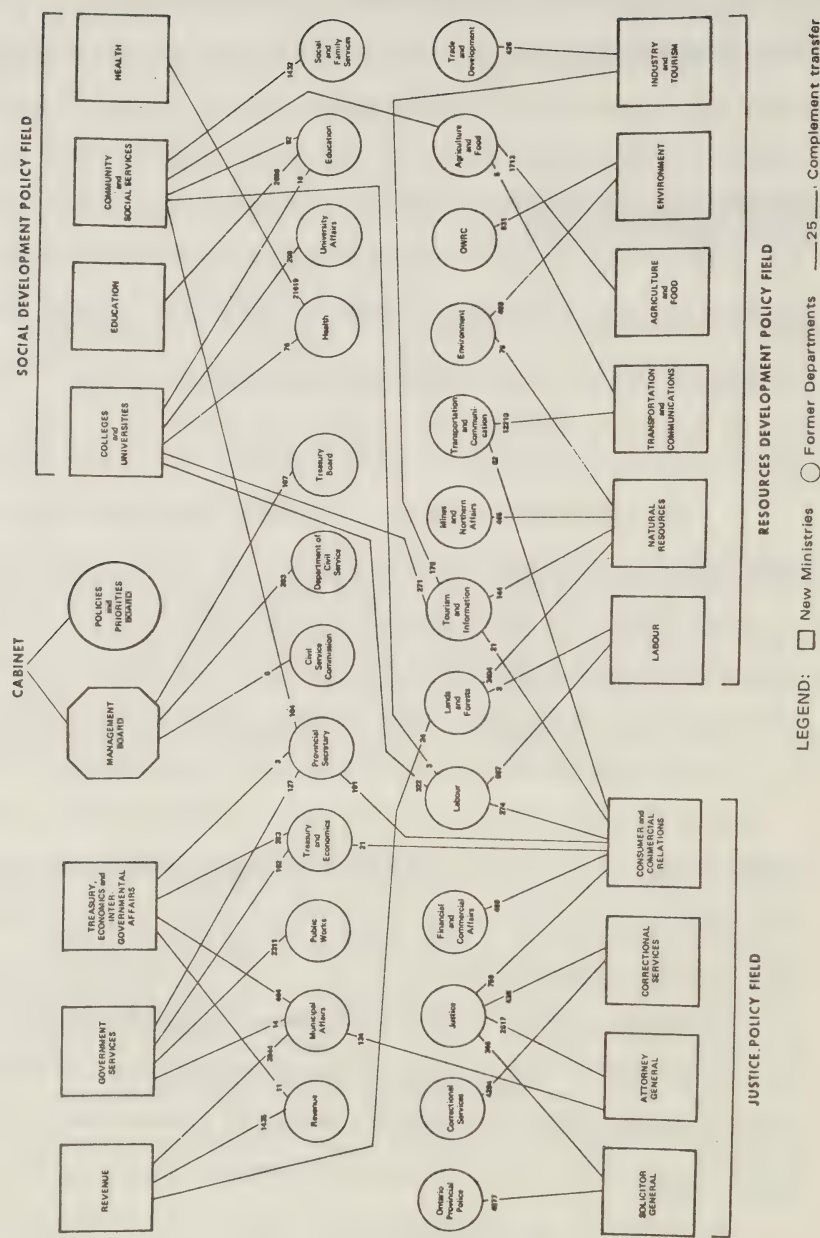
With a mandate to inquire into all matters pertaining to the management of the Ontario government, the Committee sought to reorganize administrative and policy-making structures, recognizing that what existed¹⁰ had become inadequate to meet the demands made on government

9 During these years, the COGP published 10 reports dealing with various aspects of public administration in Ontario. For critical assessments of these proposals see Kenneth Bryden, "Executive and Legislature in Ontario: A Case Study of Governmental Reform," Canadian Public Administration, 18, no. 2 (1975); George Szablowski, "Policy-Making and Cabinet: Recent Organizational Engineering at Queen's Park," in Donald C. MacDonald, ed., Government and Politics of Ontario (Toronto, 1975); also see James D. Fleck, "Restructuring the Ontario Government," Canadian Public Administration, 16 (Spring, 1974); J.R. Mallory, "Restructuring the Ontario Government -- A Comment," ibid.; also of interest is Donald V. Fowke, "New Structures in Policy Coordination," paper presented to the Annual Conference of the Institute of Public Administration of Canada, (August, 1976).

10 For a discussion of pre-COGP structures, see Schindeler, op.cit., c. 3.

FIGURE I *

The Restructuring of the Ontario Government



* Committee on Government Productivity, Report Number Ten, A Summary, (March, 1973) 67.

as a result of rapid social change and the increasing complexity of social and economic problems and issues. What was required under these conditions was a new management style that would improve the policy-making capabilities of senior officials and ministers. Not only was there a requirement to improve effectiveness, but also efficiency, given that public expenditures could not continue to rise in the future as they had in the past. The combination of budgetary constraint along with continued demand for government services and programs necessitated, according to the Committee, a well-defined and rational process of setting priorities among competing goals and evaluating program results.¹¹ The creation of appropriate government structures was perceived as crucial to the implementation of this new management style.¹²

First to be reorganized was the Cabinet. As the Committee argued, policy-making at the apex of government had to be formalized on the basis of a hierarchical Cabinet committee system, with each committee having a clearly defined role in the policy-making process. The full

11 These issues are explored in the COGP's Interim Report Number Three (December 1971), 7-13 and Interim Report Number Two (March, 1971), 2-7.

12 The theoretical basis for the Committee's approach to structural reorganization was provided by the studies and writings of Peter F. Drucker, The Age of Discontinuity, (New York, 1968); Paul R. Lawrence and Jay W. Lorsch, Organization and Environment, (Boston, 1967), and their article, "Differentiation and Integration in Complex Organizations," Administrative Science Quarterly, 12, no. 1 (June, 1967); some of these same ideas had also been expressed by Malcolm Rowan, "A Conceptual Framework for Government Policy-Making," Canadian Public Administration, 13, no. 3 (fall, 1970).

Cabinet could continue to serve as the ultimate decision and policy-making body, while the specialized sub-committees of Cabinet would serve to make comprehensive reviews of policy proposals before the adoption of a final course of action.

The new committees of Cabinet would consist of the following:

- 1) Policy and Priorities Board
- 2) Management Board
- 3) Policy Field Committees
 - . Justice
 - . Social Development
 - . Resources Development
- 4) Legislation Committee
- 5) Regulations Committee

The Legislation Committee would review the wording of a proposed piece of legislation before approval by Cabinet, and the Regulations Committee would review regulations requiring Executive Council or Cabinet approval.¹³

Management Board, created by statute, would comprise what was the Treasury Board and absorb the functions of the former Department of Civil Service. The Board would have responsibility for establishing

13 COGP, Interim Report Number Two, 10.

and monitoring personnel policies, and would also assess the relevance of the overall organization of the public service to the programs and objectives of the government. It would continuously monitor managerial efficiency in the delivery of services and the management of programs and activities. It would approve operating policies on matters such as common services to government agencies, accounting methods and requirements, and personnel and staff relations. With respect to estimates, it would conduct analyses of the resources required and their allocation, and would review the results. The Board would also assist Cabinet and its other committees in evaluating the long and short-term financial and administrative implications of new program proposals.¹⁴ The Board would be composed of its own Chairman along with the Minister of Treasury, Economics and Intergovernmental Affairs, the Minister of Revenue and Government Services, and at least one minister from each of the policy fields.

The Policy and Priorities Board, also established by statute, has the responsibility of advising Cabinet on the government's overall priorities as these pertain to policy proposals that come from the ministries, task forces and Cabinet committees.¹⁵ In addition, the Policy and Priorities Board would "initiate re-evaluations of selected ongoing programs," and would "identify and initiate policy analyses on

14 Ibid., 9, 34.

15 Ibid., 7; also see Interim Report Number Three, 34.

those issues which are not presently being examined by any department or agency." To carry out these functions effectively, the Board would "need to develop a long-term strategy of where the government is going and why."¹⁶ The Premier as Chairman, the Chairman of Management Board, the Minister of Treasury, Economics and Intergovernmental Affairs and three policy field ministers or Provincial Secretaries would constitute the Board.

The three policy field committees of Cabinet were created to correspond to the grouping of newly reorganized ministries (formerly departments) into three policy fields -- justice, social development, and resources development (see Figure 1). The three provincial secretaries would chair each of these policy committees of Cabinet. Composed of line ministers in a given policy field, the committees' responsibilities would include the resolution of conflict and the coordination of policy formulation between those ministries related in function.¹⁷

Next to be reorganized were what were known as "departments." Their restructuring involved three stages. First, some administrative units were regrouped and shifted from one department to another in an attempt to eliminate overlapping jurisdiction or duplication of effort. In this process, some departments were abolished. After this regrouping, the

16 COGP, Interim Report Number Two, 7.

17 Ibid., 10.

departments were transformed into "ministries," which encompassed the newly integrated elements of various former departments and related agencies, boards and commissions. Thirdly, ministries related in function were grouped into three policy fields¹⁸ (see Figure 1).

Within the new ministries, the COGP recommended that there be comparable restructuring. In relation to policy-making at the ministry level, the COGP sought to separate policy development and program delivery without completely destroying the connection between the two. One of the criticisms of the old departmental structures was that those responsible for the daily administration of programs and services were also responsible for policy formulation. Preoccupied with the former task, program managers were less able to perform the latter. To let the managers manage and the planners plan, the COGP recommended that the policy function in the new ministries be centered in a policy research analysis unit or secretariat, or that there be a small group of civil servants working in direct contact with a deputy minister, or that there be senior management committees dealing with policy development and administrative issues. The motive behind this recommendation was the recognition that despite the special policy roles assigned by the COGP to the Cabinet committees, "the primary responsibility for constructing policy proposals rests with the individual ministries."¹⁹ In order to

18 COGP, Interim Report Number Three, 42-43.

19 COGP, Interim Report Number Nine, 20.

fulfill this function, ministries had "to develop the necessary expertise, including skill in research and policy analysis, as well as the most effective methods for formulating sound and relevant policy."²⁰

B. The Policy-Making Process
as Envisaged by the COGP

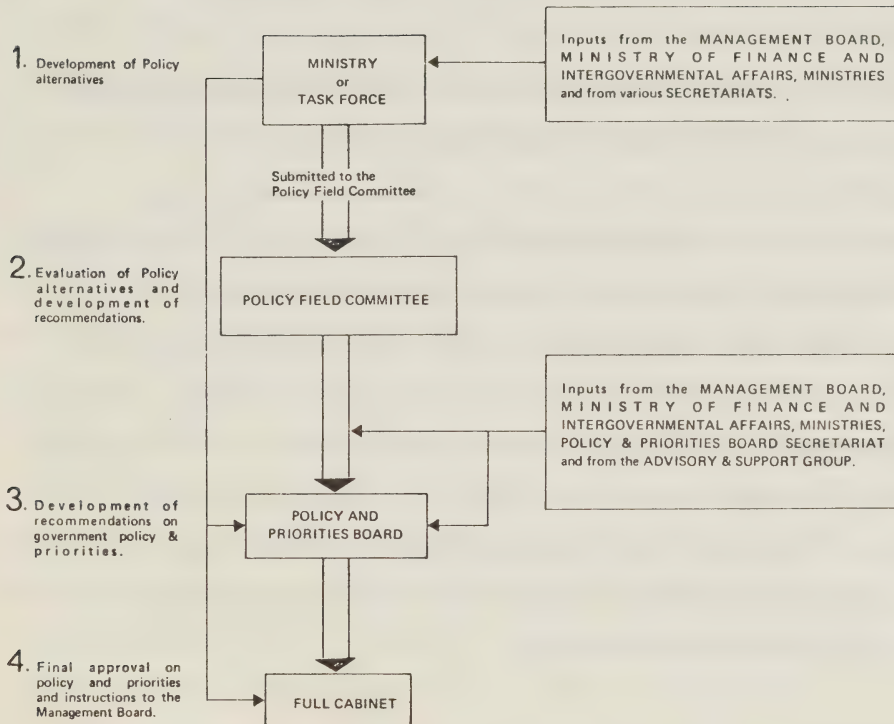
As the new policy structures themselves suggest, decision-making as envisaged by the COGP would be concentrated at the Cabinet level, and would deal primarily with the adoption of new policy proposals, and to a lesser extent with the re-evaluation of a selected number of continuing programs. The process is restricted largely to matters requiring Cabinet approval before implementation is achieved by such policy instruments as new legislation, amendments to existing statutes, a new regulation, order-in-council, or a ministerial policy statement. Excluded from this process would be decisions made by ministers or civil servants under delegated authority, i.e., authority to act as prescribed by a particular statute or regulation. The COGP envisaged the policy-making process as comprising four interrelated stages²¹ (see Figure 2).

20 Ibid.

21 These four stages follow the outline given in Interim Report Number Three, 65-67.

FIGURE II *

A PROPOSED POLICY-MAKING PROCESS



* COGP, Interim Report Number Three, 64.

Stage One: At this stage, policy alternatives are identified and developed. According to the COGP, the identification of policy issues was to be an internal government matter. The Premier, the Cabinet, Provincial Secretaries, line ministers, and the committees of Cabinet were to be the primary sources for such policy initiatives.

Analysis and study of the policy proposal and its alternatives would take place next, and would be undertaken by the staff in a given ministry or by a task force, each of which would maintain close consultation with the appropriate policy minister. It is highly likely that the policy alternatives developed early on would impinge on more than one ministry; consequently, several ministries would have to be consulted at this stage, especially the Ministry of Treasury, Economics and Intergovernmental Affairs, which given its concerns would wish to assess the policy proposal with respect to taxation and fiscal policy, regional government, and federal-provincial relations. Moreover, the Management Board Secretariat would review the policy or program proposal as to its possible costs.

Stage Two: At this stage, the policy proposal and its alternatives would be examined by one of the three policy field committees which would make a recommendation to approve or reject the proposal. The policy field committee would provide an opportunity for the various ministries in that particular policy field to make comments and seek clarification or modification of the policy proposal. Civil servants would be

expected to participate along with their ministers in setting forth and explaining their particular proposal. The COGP, however, did not indicate whether these civil servants were to play an active or passive role with respect to their advocacy of a particular policy. In addition, the Committee, while it envisaged the participation of outside groups at this stage, did not provide any further clarification of their policy role: are they merely sources of information, or do they play an active part in influencing the Cabinet committee?

Stage Three: Whether the policy field committee would be able to agree on a set of recommendations or not, the matter would have to go before the Policy and Priorities Board. The policy field committee could discuss and make assessments on the merits of a particular policy proposal, but only the Board would evaluate that proposal in the context of other pending policies and with respect to ongoing policies and programs of the government. And for the Board to be able to set priorities among these competing policies and programs would require that it formulate long-term objectives of the government and effect a reconciliation of the proposals consistent with these objectives.

Stage Four: Final approval of the Policy and Priorities Board decision would be made by the full Cabinet. As envisaged by the COGP, the Cabinet at this stage would give formal approval, the matter having been decided previously at the Policy and Priorities Board. This is not to say that the Cabinet would lose its role as the final decision-

making body, since controversial and emergency issues could still be routed directly to Cabinet; however, the COGP did think that most issues would follow the above described set of procedures, with the result that the full Cabinet would be less active in making the final decision.

Once Cabinet approval has been given, the Cabinet Secretariat would then inform Management Board and the appropriate ministries as to their responsibilities in implementing the decision.

As conceived by the COGP, the policy-making process would be relatively self-contained within the Cabinet committee system and would centre primarily on the policy role of ministers as opposed to civil servants.

CHAPTER III

ACTORS IN THE POLICY-MAKING PROCESS

In the previous chapter, the present policy structures as implemented by the COGP were described in some detail. In this chapter the principal actors and participants in the policy process will be identified. Their roles will be briefly described with a view to indicating the nature of the information that each policy actor generates or brings to that process. The following actors or participants will be discussed:

- 1) The Cabinet Office and the Premier's Office
- 2) Policy Ministers
- 3) Cabinet Ministers
- 4) Deputy Ministers
- 5) The Relationship between Ministers and Civil Servants
- 6) Advisory Bodies
- 7) Consultants
- 8) Media
- 9) The Legislature and its Members
- 10) Organized Interest Groups
- 11) The General Public

A. The Cabinet Office and
the Premier's Office

In Westminster-style parliamentary systems, Cabinets are at the centre of the policy process; they have responsibility for formulating, coordinating, and implementing policy.²² We have already seen how the COGP sought to strengthen these policy roles of the Ontario Cabinet system. Our attention here will be focused on those structures that directly support Cabinet and the Premier.

The Cabinet office, headed by the Secretary of the Cabinet and Clerk of the Executive Council, has an administrative and policy support function with respect to Cabinet and its committees. The Operations section, headed by an Associate Secretary of Cabinet, has responsibility for processing confidential Cabinet submissions, preparing agendas, and recording Cabinet decisions. Once a Cabinet submission document is received by the section, it is checked to ensure that it contains the necessary information, analysis, options, and recommendations on which Cabinet or its committees can make a judgment. Once this is done, the submission will be forwarded to the appropriate Cabinet committee for review. While this procedure is followed as closely as possible, there are exceptions. Ministers often request that a particular policy issue or problem be decided on by the Cabinet itself,

22 Bryden, "Cabinets," in Bellamy et al., op.cit., 310.

rather than by one of its committees. Moreover, the issue may be deemed important enough to require immediate attention, in which case the memorandum supporting the minister's position may not contain a lengthy analysis and the policy options of a formal Cabinet submission document. Ad hoc decisions to depart from the formal process envisaged by the COGP would normally be taken by the Secretary of Cabinet in consultation with the minister concerned, and perhaps even the Premier.²³

The Policy section of the Cabinet Office, staffed by civil servants, aids the Cabinet and its committees in its policy-making functions. Each of the Cabinet committees has its own secretary whose responsibility it is in the first instance to record Cabinet decisions. There is no formal minute-taking of debates; rather, informal notes are taken by these Cabinet Office officials and used to prepare a record of the final decisions. A document containing a record of the latter is circulated to the ministers for correction before being finally recorded.²⁴ As well, there exists within the Cabinet Office a small research staff, attached to the Policy and Priorities Board, which is involved in policy analysis. While it does not have the research and analysis capabilities of the ministries, this staff is involved in

23 In an interview, Dr. E. Stewart, Secretary of Cabinet, indicated that the formal, rational pattern is followed only 50% of the time.

24 Interview with Mr. David Lewis, Associate Secretary of Cabinet.

some policy analysis, as well as coordinating such analysis between ministries and the policy field secretariats.²⁵

Given its functions and the interaction of its staff with the Premier, the Cabinet and its committees, and the ministries, the Cabinet Office is pivotal to the smooth and efficient functioning of the policy process at the Cabinet level.

The Office of the Premier, as suggested by the title, serves the Premier personally and is headed by a Deputy Minister who may also serve as Secretary of the Cabinet. Second in rank is the Executive Director and Executive Assistant to the Premier, who is charged with the responsibility of acting as liaison between the public and the Premier and who advises the Premier on issues and problems that need the Premier's personal attention.

The Office of the Premier and the Cabinet Office function in such a way that the political process and the administrative process in policy-making come together and mesh, so that it becomes impossible to differentiate between the two. This merely reflects the fact that policy-making, no matter how technically detailed it becomes or how objective it seeks to be in choosing courses of action, is ultimately a political process that requires the making of political judgments.

25 J. Simeon, "The Ontario Cabinet: An Examination of the COGP Reorganization," Master of Arts Thesis, York University, (September, 1976) 42-43.

B. Policy Ministers

Some mention has already been made of the special policy role assigned by Cabinet ministers who assumed the position of Provincial Secretary. They were given no responsibilities for any operational department or ministry; rather, "their duties are solely in the areas of policy advice, formulation and coordination."²⁶ Their policy influence within the policy process at the Cabinet level stems from their research and analytical base, which enables them to evaluate policy proposals that come from operating ministries from a wider perspective.²⁷ As Ministers responsible for research and policy analysis rather than the administration of government programs and services, Provincial Secretaries are unique in our system of government.

This fact may be a source of political weakness, however, in that they tend to be politically invisible.²⁸ Not having monies to expend on programs and services, Provincial Secretaries cannot gain the benefit of the public's response to those benefits. Nor can they benefit from public exposure that attends questioning of their activities in the legislature, since in serving the Cabinet committee system, their

26 M.A. Chandler and W.M. Chandler, Public Policy and Provincial Politics (Toronto, 1979) 106.

27 Bryden, "Cabinets," 322.

28 J.R. Mallory, "Responsive and Responsible Government," Transactions of the Royal Society of Canada, Series IV, XII, (1974) 216.

activities in policy formulation are by tradition shrouded in confidentiality.²⁹

In part this also applies to the work of their support staff, the Provincial Secretariats. Engaged in policy formulation, analysis and evaluation, they serve the Provincial Secretaries in their capacity as chairmen of the policy field committees of Cabinet. They also serve the Provincial Secretaries in their capacity as policy ministers, and are thus obliged to prepare position papers and conduct other types of research. Their work at this level can be likened to that of the research and policy analysis divisions of any of the line ministries. As a general matter, their work would be subject to the strictures of confidentiality that surrounds the Cabinet.

C. Cabinet Ministers

As the Committee on Government Productivity recognized, Cabinet ministers play an exceedingly complex and demanding role in our parliamentary system of government.

29 Szablowski, "Policy-Making and Cabinet," in MacDonald, op.cit., 123-124.

A Cabinet Minister is:

- the executive head of a large department consisting of thousands of employees and involved in the control of many millions of dollars
- a member of the executive committee (Cabinet) of a multi-billion dollar enterprise
- a key member of a political party who must play his part in shaping the party's policies and organization
- an elected representative of his constituency to which he is personally accountable
- a member of the Legislature which in recent years has extended its work until it now is in session for the greater part of each year.

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The first two items on this list are of particular interest in the present context. As we have already seen, one of the prime motives for the COGP's reform of the Cabinet system was to relieve the ministers' workload without, at the same time, reducing their responsibilities. Indeed, the COGP reforms attempted to maximize effective public service support for the minister in perhaps his most important area of responsibilities, his participation in the formulation of public policy at the Cabinet level.

A minister's responsibilities are established in part by historical tradition, in part by statute. That part established by tradition is based on the constitutional principles of collective and individual

ministerial responsibility.³¹ Collective ministerial responsibility refers to the notion that all ministers collectively are responsible for the policies and programs of the government as a whole. When Cabinet makes a decision, all ministers, whatever their private reservations, must publicly support that decision, but if a minister cannot be united with his colleagues, he must, by tradition, resign from the Cabinet. Individual ministerial responsibility, like collective responsibility, embodies the principle of accountability which, according to traditional interpretations, makes each minister individually responsible for all the activities undertaken by the ministry's civil servants.

The pressures of decision and policy-making under conditions of a complex modern political life have encouraged ministers to delegate some of their responsibilities to senior civil servants. In some cases, such delegation has been established by statute, while in other situations the practices of the personalities involved will determine the degree of delegation.

We will return to a consideration of the relationship between ministers and public servants after examining, in the next section of this chapter, the role of the most important of these, the deputy minister.

31 See generally, Kernaghan, Freedom of Information and Ministerial Responsibility, op.cit.

D. Deputy Ministers

The deputy minister plays an active role in policy-making, though the precise nature of that role is not easily defined.³² He wears several hats in his capacity as the permanent head of the ministry; he is the ministry's principal administrator; he has the responsibility for staffing and organizing the ministry, and he is the minister's most immediate policy advisor. He can be perceived as a link between the minister and the bureaucracy, between the political process and the administrative. While his role as the administrative head of the ministry is well-defined, his role as policy advisor is more difficult to describe. Constitutionally, the minister is ultimately responsible for all policy decisions, yet the deputy minister is involved in the policy-making process; he gives advice, talks to interest groups, assesses political issues, and makes recommendations. To be effective he must identify with the objectives of his minister, yet at the same time, he will present his own ideas as to what course the minister should adopt. The role of the deputy minister, in short, is a subtle one. He is a professional advisor, yet he cannot remain aloof from

32 For discussions of the deputy minister's role vis-a-vis his minister, see A.W. Johnson, "The Role of the Deputy Minister," in W.D.K. Kernaghan, ed., Public Administration in Canada, (Toronto, 1977); Herbert R. Balls, "Decision-Making: The Role of the Deputy Minister," Canadian Public Administration, 19, no. 3 (fall, 1976); also see William A. Matheson, "The Cabinet and the Canadian Bureaucracy," in Kernaghan, ibid.

the political process in which his minister is engaged.³³ He must resist any temptation to displace the public role of his minister who retains the responsibility for policy decisions; he should maintain a posture of political anonymity.³⁴

Obviously, a delicate balance needs to be struck between the minister's own active voice in policy-making and that of the deputy minister. Whether such a balance is struck may often depend on the deputy minister, who will normally possess the greater skill and experience in the ministry's area of activity with which he could overwhelm the minister, and who is also in a position to undercut a minister by his ability to control the flow of information reaching him.³⁵ Whether this control over expertise and information creates a situation which tends to place the deputy minister in a dominant position with respect to his minister is open to argument. One former deputy minister at the federal level has stated that no evidence, in his view, has emerged to support the view that deputy ministers play a more dominant role than ministers.³⁶

33 See W. Darcy McKeough, "The Relations of Ministers and Civil Servants," Canadian Public Administration, 12, no. 1 (1964).

34 Johnson, op.cit., 274.

35 Richard J. Van Loon and Michael S. Whittington, The Canadian Political System, 2nd ed., (Toronto, 1976) 346; Thomas A. Hockin, Government in Canada, (Toronto, 1976) 136. In part, however, this situation can be offset by the minister seeking alternative or parallel sources of information; for example, he can seek advice from groups or institutions outside government -- interest groups, media, universities, or such policy institutes as the Ontario Economic Council.

36 Balls, op.cit., 429.

On the other hand, another former federal deputy minister has argued that the relationship between the deputy minister and his minister is flexible enough for the former to assume the dominant position. It is generally accepted, however, that the deputy minister should exercise restraint and ensure that the minister is able to effectively play his role as the ultimate decision-maker.³⁷

Traditionally, of course, the interaction between the deputy minister and minister has been veiled in confidentiality.

E. The Relationship Between
Ministers and Civil Servants

In attempting to identify the respective roles of politicians and civil servants in the policy-making process, we may begin with the traditional view that politicians have the responsibility to formulate policy while officials are left to implement the final policy decided by elected politicians. For this notion to operate in practice, there must be a distinct demarcation between politics and administration. We have seen that the COGP sought to separate politics and administration by the creation of Cabinet committees with clear policy functions. It was intended that such committees would provide the elected politician, the minister, with the opportunity to make a more effective contribution

37 Johnson, op.cit., 282.

to the policy process, and in so doing reassert the role of the politician in that process. Yet, whatever the intent of the COGP, the policy structures it implemented appear not to have diminished the role of the public servant in the policy-making process.³⁸ Indeed, it may be that the increasing complexity of public affairs must inevitably create pressures favouring greater dependency on the expertise of the public service in matters of policy formulation.³⁹

As will be recalled from our earlier discussion, the COGP conceived of the policy-making process as requiring greater measures of rationalization and efficiency. These criteria place a premium on technical expertise and sophisticated management skills and experience, qualities which in the nature of things are found in greater abundance among civil servants than elected politicians. Occasionally it may be that a minister will come to government with specialized professional or work experience to coincide with his responsibilities as minister. Nonetheless, as government policy-making becomes more complex, advantages of knowledge and information will be with the civil servant.⁴⁰

38 G. Bruce Doern and V. Seymour Wilson, eds., Issues in Canadian Public Policy (Toronto, 1974) 333.

39 Senior civil servants in Ontario perceive that 50% and better of their responsibilities consist of participating in policy development. At the same time, there is indication that these same civil servants would like to increase their time spent on policy formulation. See Harvey Rich, "From a study of higher civil servants in Ontario," Canadian Public Administration 17, no. 2 (spring, 1974).

40 Mallory, "Responsive and Responsible Government," 216.

For governments to be able to effectively determine policies and order priorities, modern tools of data gathering and analysis are required. Thus, governments recruit highly skilled individuals in such fields as computer programming, operations research, policy analysis, and econometrics, to name only a few.⁴¹ A recent survey of senior civil servants in Ontario has revealed that 88% hold a university degree, and that of 237 officials with such degrees, 37% have degrees in science and engineering, 20% in the social sciences and humanities, 11% in medicine, 6% in law, and the rest in other disciplines.⁴²

With such skills and expertise, modern governments are highly proficient data and information gathering and storing organizations. They have become, in effect, storehouses of information relating to all aspects of society's activities.

Not only does the civil servant possess easy access to stored government information, but increasingly he has been assigned roles and functions that no longer restrict him to being a mere administrator. Various statutes delegate to him discretionary powers that allow him to pre-empt the functions of the judiciary, the legislature and even the

41 These issues are explored by J.E. Hodgetts, "Public Power and Ivory Power," in T. Lloyd and J. McLeod (U.S.), Agenda 70: Proposals for a Creative Politics (Toronto, 1968).

42 Rich, op.cit., 328-334.

executive.⁴³ If we define "political" power as the legitimate authority to allocate values and resources in society, it is clear that the delegation of political power to public servants is an increasingly common occurrence. These trends have blurred the traditional distinctions between administration and politics.⁴⁴ As far as the policy-making process is concerned, civil servants are expected to be active participants who can initiate policy proposals, provide expertise, information and analysis, and make policy decisions.⁴⁵

On the other hand, this is not to say that politicians have become obsolete. In making policy decisions either at the ministry level or at Cabinet, the elected ministers bring a keen sense of what is politically possible and appropriate. Administrative expertise is no substitute for political acumen when the relative effects of a decision on various groups or individuals in society have to be taken into consideration before a decision is made.⁴⁶ Ministers accept and

43 For a discussion of this point, see R. MacGregor Dawson, The Government of Canada, 5th ed., revised by Norman Ward, (Toronto, 1970), c. 14; also see Schindeler, op.cit., c. 7.

44 Chandler and Chandler, op.cit., 109.

45 The need for senior civil servants to be active participants in policy-making has been recognized by a former Ontario Minister, McKeough, op.cit., 4.

46 D.G. Hartle, "The Public Servant as Advisory: The Choice of Policy Evaluation Criteria," Canadian Public Policy, 11, no. 3 (summer, 1976) 433-434.

are expected to accept the final responsibility for how policies and programs affect the public. However, the political function performed by ministers within the context of policy-making should not obscure our view of the fact that a very critical role in the policy process is played by the civil service.

In many areas of governmental activity, civil servants possess a virtual monopoly on information and expertise. While this is, in some sense, an inevitable result of the need of modern democratic governments for "effective methods for obtaining highly skilled advice and information,"⁴⁷ exclusive reliance on civil servants for policy advice would be seen as something of a mixed blessing. There is a need, which governments themselves have recognized, for a wider range of ideas and alternatives to be canvassed before a final decision is made. The use of commissions of inquiry, task forces, consultative and advisory bodies, and the hiring of outside consultants and experts are evidence of this. It may be noted, however, that initiatives of this kind extend participation, for the most part, to non-governmental "experts," who may share in large measure the perspectives and orientations of experts within government. Some observers have argued that there are inherent problems in this concentration of expertise, one of which is that experts, whether in government or outside, will bring to the resolution of

47 J.J. Deutsch, "Governments and their Advisors," Canadian Public Administration, 16, no. 1 (spring, 1973) 26.

of problems and policy formulation narrow professional or bureaucratic values and attitudes.⁴⁸ When we add the fact that policy formulation is hidden from public view by our traditions of administrative secrecy, other values and perspectives existing in society have a hard time competing for the attention of government policy-makers. Ideally, the role of the politician must be one of bringing such values and perspectives to bear on the process of policy formulation.

F. Advisory Bodies

A study prepared for the Ontario Economic Council has identified some 96 different advisory bodies operating in the Ontario government.⁴⁹ At least two major rationales for establishing advisory bodies may be identified. First, advisory bodies may be established to provide policy advice to government in those areas where government itself lacks sufficient expertise.⁵⁰ Secondly, some advisory bodies also are established to fashion formal links between government and organized interests.⁵¹

48 Ibid., 30-34.

49 Ontario Economic Council, Government Regulation, (1978) 217-222.

50 H. Chapin and D. Duncan, Citizen Involvement in Public Policy-Making: Access and the Policy-Making Process, Canadian Council on Social Development, (1978) 35.

51 T.B. Smith, "Advisory Committees in the Public Policy Process," International Review of Administrative Sciences, XLIII, No. 2, (1977) 153.

When established for either of these reasons, however, advisory bodies may be seen to have limited capacity as forums for broad public participation, though to be sure, to the extent that they are able to formulate independent policy proposals they may provide a useful perspective on policy issues.⁵²

A large variety of advisory bodies exists at any given time; some are temporary and are created to deal with a specific issue, while others are formally established (under statutory authority or by order-in-council) and operate for indefinite periods. Advisory bodies can be categorized in the following manner:

- 1) Those of a general advisory nature
- 2) Scientific or technical advisory bodies
- 3) Special clientele advisory bodies
- 4) Special task advisory bodies
- 5) Geographically based advisory or consultative bodies.⁵³

In Ontario, extensive use is made of advisory bodies in each of these categories.

52 See generally, C. Lloyd Brown-John, "Advisory Agencies in Canada: An Introduction," Canadian Public Administration (spring-summer, 1979) 90-91.

53 Smith, op.cit., 156. Two other types of advisory bodies exist -- interdepartmental and intergovernmental -- but these are composed of members drawn from the public service and thus lie outside the scope of our attention here.

As illustrations of the phenomenon of formally established long-term advisory bodies, reference will be made to the work of four advisory "councils," the Advisory Council on the Status of Women, on Multiculturalism, on Senior Citizens, and on Franco-Ontarian Affairs. The last-mentioned council reports to the Ministry of Culture and Recreation, while the other three report to the Provincial Secretary for Social Development.

These councils perform several functions within the policy process.⁵⁴ At times they may act, in effect, as pressure groups that seek to initiate new policy directions. In such instances, council members may first canvass the support of various interested groups and individuals, in order to exchange information and perhaps develop a consensus on the issue in question. This stage having been reached, the advisory council, with the active support of interested groups, will approach government policy-makers with its policy recommendations.

An example of an advisory council acting in this way would be the efforts of the Advisory Council on the Status of Women to achieve significant reform of the province's Family Law. The Council engaged in extensive consultation and negotiation with womens' groups. Many of the latter became participants in the policy process by joining

54 The following account is based on interviews with officials of the four advisory councils mentioned in the text.

with the Council in an effort to influence the position of the government. In other cases, however, the initiative may come from interested citizens themselves. The Advisory Council on Senior Citizens, for example, was involved in a situation of this kind. Instead of the Council itself enlisting the support of some group, senior citizens unhappy with housing facilities provided by the Ontario Housing Corporation came forward and enlisted the support of the Council. The latter was able to focus the concerns of the senior citizens in question and channel them effectively toward government policy-makers.

At other times, a Council may function as a policy evaluator. This process is often initiated by a minister who seeks a response for a policy proposal by enlisting the expertise of a council. The council in turn will make recommendations that will be of most benefit to those whose interests it purports to represent. Thus, the Council on Franco-Ontarian Affairs advised the Attorney-General regarding the provision of court services in the French language. These recommendations led to the reform of The Judicature Act. Further, the Council advised the Minister of Health with respect to a priority ranking of the health care services which should begin to be provided in the language of Franco-Ontarians.

The Advisory Councils may also exercise an important research function, ranging from the conducting of public surveys to the holding of consultative conferences. Such research may form the basis for recommendations or advice given by the council in question.

Survey research may involve the formulation of questionnaires by council staff or outside experts which are then forwarded to a cross-section of the population. In addition, a council will typically hire outside experts to prepare background papers on some specific issue or topic. Finally, public conferences and forums may be organized by advisory councils in order to sample opinions, to help create consensus, and to coordinate policy recommendations and demands of various groups.

Apart from long-term or "standing" advisory committees of this kind, short-term task oriented bodies are also frequently employed by the Ontario government. Two types of advisory bodies may be distinguished -- royal commissions and task forces. Royal commissions of inquiry are temporary research or investigative bodies created usually for the purpose of providing independent expert and critical analysis of a specific, often politically controversial, problem or issue.⁵⁵ Their ability to influence policy-making obviously varies considerably from one commission to the next. Some political scientists have taken an uncomplimentary view of the effectiveness of commissions as agents of policy formulation, suggesting that governments may often establish commissions in order to delay making a final decision on the matter, or to assuage public opinion by showing that the government is indeed concerned about a particular problem, without, at the same time,

55 Hodgetts, op.cit., 273-274; V. Seymour Wilson, "The Role of Royal Commissions and Task Forces," in Doern and Aucoin, op.cit., 113.

committing it to the adoption of a commission's recommendations.⁵⁶ Indeed, in the light of these criticisms and others, in particular their enormous cost, commissions have been judged by at least one commentator as having a negligible impact on policy-making.⁵⁷ On the other hand, one critic has observed that despite their limitations, commissions can, by drawing on expertise from various disciplines, increase our fund of knowledge about various aspects of Canadian society and serve a useful function in our policy-making processes.⁵⁸

The distinguishing features of task forces appear to be that they have a shorter time limit than royal commissions, have a greater mix of intra- and extra-government advisers, and are less independent of the executive than royal commissions.⁵⁹ Indeed, it is not uncommon for task forces to be drawn exclusively from the public service. Because of these characteristics, the work of task forces is usually shrouded in administrative secrecy. There is no requirement for the publication of their final reports.⁶⁰ Under these circumstances it is difficult

56 Wilson, op.cit., 114.

57 Ibid.

58 Hodgetts, op.cit., 275. He does, however, think that there ought to be some way of continuing the research undertaken for a short time by commissioners, so as not to lose the benefit of the initial research.

59 Wilson, op.cit., 115.

60 Ibid., 124.

to know precisely the impact task force reports have on policy-making.⁶¹

G. Consultants

Governments often employ outside consultants when individual government agencies find they need to obtain special expertise unavailable within government. The Ontario Manual of Administration, in addition to setting out specific guidelines and criteria to be used in hiring consultants, provides an outline of the scope of consulting services the Ontario government may require. Thus, management consulting services encompass consulting services in the area of policy and strategic planning, operational management, human resources, finance, and information systems and technology; and also include multi-discipline studies of complex policy issues such as feasibility of resource development, analysis of alternative policy strategies and regional planning.⁶² As for technical consulting services, these would include the services of architects, accountants, actuaries, appraisers, community planners, engineers and related technologists, health professionals, interior design consultants, real estate agents,

61 There is some indication that some task forces have proven to be ineffectual in the long-run because of their inability to thoroughly investigate a given issue. Ibid., 125.

62 Ontario Manual of Administration, 55-3.

scientists and surveyors.⁶³ Consulting services may also be provided in the area of data processing and communications, though in most instances government agencies would contract for actual services.⁶⁴

On the basis of this summary, the Ontario government would appear to rely on a considerable range of consulting services. However, in actual fact few studies exist that detail the degree to which consulting services are used by the Ontario government or that attempt to assess the influence consultants have on the policy process. Nor does the annual record of Ontario Public Accounts contain any summary statistics as to the total number of consultants employed in any one year or the amount of money paid for their services.⁶⁵

While it may be difficult to give a precise analysis of the degree to which the Ontario government employs outside consultants, it would appear, according to one study, that all levels of government in Canada are relying increasingly on the expertise that consultants provide.⁶⁶ Given the apparent extent to which governments use consultants, the

63 Ibid., 55-4.

64 Ibid., 55-5, 55-6.

65 Ontario Ministry of Treasury and Economics, Public Accounts 1977-78, (Oct. 1978).

66 Harry Meredith and Joe Martin, "Management Consultants in the Public Sector," Canadian Public Administration, 13, no. 4 (Winter, 1970).

latter may be said to constitute a "hidden bureaucracy." The public has little knowledge of the services that consultants provide, nor the quality of those services. Consultants' reports, though paid for out of the public purse, are usually kept confidential.

H. Media

The role of the mass media in policy-making is subject to controversy.⁶⁷ The primary function of the media in this regard is one of informing public opinion through its reportage and assessment of public affairs. The performance of the media in this respect in Ontario has been criticized. Some critics have argued that the news coverage of Ontario politics by the mass media is superficial and inadequate. It is alleged that news coverage places emphasis on alarmist headlines, scandals, or "leaks," and offers little expert and comprehensive analysis of public issues. The media may act as a vehicle for aggregating public concern, and as a goad to government action, but do not provide sustained analytical assessment of public affairs.⁶⁸

67 See Fredrick J. Fletcher, "Between Two Stools: News Coverage of Provincial Politics in Ontario," in MacDonald, op.cit., 249.

68 Patrick Kyba and John B. Black, The Sources of Information of Public Officials in Ontario, paper presented to the Annual Meeting of the Canadian Political Science Association, (June 8-11, 1971), 36; also see Fletcher, op.cit., and D.G. Hartle, Public Policy Decision Making and Regulation (1979), 82-83.

One commentator, Professor Fletcher, has summarized his views in the following terms:

In this survey of news coverage of provincial politics in Ontario, we have found that the pool of information available to Ontario citizens is relatively small, unevenly distributed and derived mainly from coverage of the Legislature, with emphasis on the question period. We have also seen that gallery members often lack the time and access to information necessary for probing analyses of government programs and policy options. These patterns have the effect of limiting the capacity of citizens to influence public policy and sometimes of reducing the effectiveness of government programs because citizens who might benefit from them never hear about them. The influence of the Legislature is reduced by inadequate coverage (especially of debates) and the uneven distribution of information helps to exacerbate problems such as northern alienation.

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The emphasis here on lack of access to information as an explanation for these deficiencies is of interest in the present context. This point has been raised in submissions from the press to this Commission.⁷⁰ The extent to which greater access to information would affect an improvement in media coverage of public affairs is, of course, a matter of speculation.

The media perform other functions in the policy-making process, however. Thus, the use of the mass media, particularly television, by politicians and interest groups seeking public support has increased.⁷¹ Mass

69 Fletcher, op.cit., 265-266.

70 See Briefs Nos. 22, 24, 28, 32, 34, 47, 58, 69 and 86 submitted by the Ontario Press Council, the Chatham Daily News, the Hamilton Spectator, the Canadian Daily Newspaper Publishers Association, the Kitchener-Waterloo Record, the London Free Press, the Kingston Whig Standard, the Sault Star and the Radio-Television News Directors Association of Canada, respectively.

71 A. Paul Pross, "Canadian Pressure Groups in the 1970's: Their Role and their Relations with the Public Service," Canadian Public Administration, 18, no. 1 (spring, 1975) 126.

media have become a crucial transmitter of information from government to public from the public back to government. Television, in particular, has provided a channel of communication permitting a variety of issues and causes to be publicly debated by groups hitherto unable to catch the attention of policy-makers.⁷² Here too however, Fletcher expresses some reservations:

... the media severely limit the amount and complexity of information that candidates can communicate to the public. They simplify election campaigns by focussing on a few issues and by emphasizing leaders, thus limiting the bases upon which voters can judge. In addition, they tend to pay more attention to government leaders than to opposition spokesmen, giving incumbent officials a (perhaps inevitable) built-in advantage in the never-ending contest for public attention. 72a

In sum, then, while the role of the mass media as a source of informed comment on public affairs and as a vehicle for the communication of the views of others is of obvious significance, controversy surrounds the question of whether its influence in either respect is all that it could, and perhaps should, be.

I. Members of the Legislature

Excluding Cabinet ministers, members of the Ontario legislature can be placed in two categories, government backbenchers and opposition MPPs.

72 Ibid., 133.

72a Fletcher, op.cit., 266.

As legislators, all MPPs have an opportunity to participate in the debates in the Assembly and in the work of the standing committees. As far as government backbenchers are concerned, however, the realities of the party system are such that they are restrained from active involvement in debates. They cannot publicly criticize proposed legislation lest they embarrass their colleagues in Cabinet.⁷³ It is no doubt for this reason that Schindeler comments that "for all practical purposes, the legislative branch is co-extensive with the opposition parties."⁷⁴

Consequently, the only effective forum for backbenchers is party caucus meetings in which ministers explain their policy positions, and allow backbenchers the opportunity to influence those policy decisions before they are announced in the House. Cabinet, according to one study, gives considerable weight to the opinions of its party members, for although there is only a remote chance that the government party members will seek to withhold support, any open dissention could cause embarrassment for the Cabinet.⁷⁵ As far as opposition MPPs are concerned, of course, it is evident that their role in the context of a majority government is not likely to be substantial. In a formal

73 Schindeler, op.cit., 124-125; Harold D. Clark, Richard G. Price and Robert Krause, "Backbenchers," in Bellamy et al., op.cit., 231-232.

74 Schindeler, op.cit., 124.

75 Ibid., 125.

sense, at least, they have no power to bring to bear on the process.

Thus, although constitutionally speaking the legislature is the highest political and legal decision-making body in the province, in practice its effectiveness has diminished with the accretion of effective power and control in the executive branch. The legislature is left to act as little more than a rubber stamp for decisions made by the Cabinet and the bureaucracy.⁷⁶ With the growth of the executive branch and its decision-making capabilities, there has been an accumulation of information and expertise by the executive and the bureaucracy which has not been matched by opposition MPPs.⁷⁷ At the same time, as will be indicated in Chapter IV of this paper, the rules of the House are restrictive of the members' ability to get information from the government.

In recognition of this problem, the Camp Commission made several recommendations to improve the policy-analysis capacities of opposition

76 Donald C. MacDonald, "Modernizing the Legislature," in MacDonald, op.cit., 94; also see Schindeler, op.cit., 265. The diminished role of the legislature and opposition parties in Western democracies has been extensively discussed; see, for example, G. Ionescu and I. de Madariagu, Opposition (Harrisworth, 1972); Karl Dietrich Backer, "The Crisis of Modern Parliaments," in Roy C. Macridis and Bernard E. Brown, eds., Comparative Politics, 3rd ed., (Homewood, Ill., 1968).

77 Ontario Commission on the Legislature, Second Report (Sec. 1973) 49-54.

MPPs. In addition to recommending that they use the rules of the House more aggressively, the Commission proposed that more resources be allocated to improve the research capabilities of the opposition parties and the Legislative Library, the latter to perform a general research function for MPPs. Whether these recommendations have been judged adequate or not, opposition MPPs have stated, in submissions before the Commission on Freedom of Information and Individual Privacy, that their work as legislators would be greatly enhanced by greater access to government information.⁷⁸

J. Organized Interest Groups

A large variety of organized groups exist in Canadian society whose members act together to influence public policy in order to promote their common interests.⁷⁹ These groups are sometimes called "pressure groups," "interest groups," or "lobby groups," and encompass various sectors of the business community, agricultural interests, the labour sector, the professions, as well as other citizens groups organized

78 Submissions were made by Michael Cassidy, MPP (October 11, 1977); Donald C. MacDonald, MPP, and Patrick Lawlor, MPP (February 28, 1978); and by Sean Conway, MPP (October 19, 1978).

79 A. Paul Pross, "Pressure Groups: Adaptive Instruments of Political Communication," in idem, Pressure Group Behaviour in Canadian Politics, (Toronto, 1975) 2.

around particular issues or interests, such as consumer protection or environmental concerns.

The proliferation of these groups in the last several decades has been attributed to the growth of the Ontario government's interventionist role in the province's social and economic affairs.⁸⁰ Through its ministries, agencies, boards and commissions the provincial government regulates, sets standards, renders services and provides monies that affect various sectors of the community. To protect, defend or advance the particular interests of those affected by such intervention, organized groups have developed. One is likely to find such groups in each of the primary areas of provincial government activity: in the fields of education, health and welfare, natural resources, environment, agriculture, transportation, commerce, finance, industry and labour.

While it is difficult to assess the degree of interest group effectiveness in the policy process, since the interaction of these groups with government "goes on behind closed doors and is usually not the object of public scrutiny,"⁸¹ we do know something of the nature of this interaction. A number of observers have noted that because of the increasing concentration of decision-making in the Cabinet and the

80 David Hoffman, "Interacting with Government: The General Public and Interest Groups," in MacDonald, op.cit., 285.

81 Chandler and Chandler, op.cit., 71.

bureaucracy, and the relative decline of the legislature's role in policy-making, interest groups concentrate their attention on those policy-makers in what has been called the "executive-bureaucratic arena"; that is, on such policy structures as Cabinet and its committees, interdepartmental committees and task forces, advisory bodies, and independent boards and commissions.⁸² Presthus, in his various studies, has determined that interest group leaders have a marked preference to seek access to civil service policy-makers over and above the legislature and ministers.⁸³

Not all groups, however, have the same ability to gain access to government policy-makers. Those that are well-organized, well-funded, have considerable technical or professional expertise, and have a sophisticated knowledge of the policy process, appear to have easier access than groups not having these characteristics. In the former category we could place, for example, the Ontario Chamber of Commerce or the Canadian Manufacturer's Association. It is fair to say that

82 W.T. Stanbury, "Lobbying and Interest Group Representation in the Legislative Process," in W.A.W. Neilson and J.C. MacPherson, eds., The Legislative Process in Canada, (Toronto, 1978) 168.

83 R. Presthus, Elite Accommodation in Canadian Politics (Toronto, 1973), Elites in the Policy Process (Toronto, 1974), "Interest Group Lobbying: Canada and the United States," The Annals of the American Academy of Political and Social Science, 413 (May, 1974); R. Presthus and W. Monopoli, "Bureaucracy in the United States and Canada: Social Attitudinal and Behavioural Variables," International Journal of Comparative Sociology, XVIII, nos. 1-2 (March-June, 1977).

most groups representing industry, commerce, finance, and the professions fall into this category. It has been observed that on a personal level, leaders of these organizations are more likely than not to share common social and economic backgrounds, as well as political values and attitudes, with senior civil servants and ministers. Value differences that could lead to conflict are not profound, thereby enabling any policy differences to be settled on a pragmatic basis. Hence, the interaction of interest group leaders in this category and government officials has been characterized as one of mutual accommodation.⁸⁴

At the institutional level, the interaction of government officials and interest group leaders entails a series of "trade-offs."⁸⁵ The latter group wants the government to pursue, adopt and implement policies and programs that reflect the interests of the group's membership. For their part, government officials may want to know of the group's willingness to support a particular governmental initiative or, indeed, comply with a proposed law or regulation. Further, the group's expertise may be invaluable for policy development and in drafting any new legislation.⁸⁶ In order to gain such information, government

84 This theme of accommodation is explored by Presthus in his various studies.

85 "Trade-offs" as a function of self-interest is explored by D.G. Hartle, A Theory of the Expenditure Budgetary Process, (Toronto and Buffalo, 1974).

86 Hoffman, op.cit., 286.

officials may provide these groups with relatively easy access to policy-makers and government information. One writer has noted that as a general rule, in any process of negotiation, consultation or bargaining, official information will be provided on a selective basis in return for similar information, with such interaction taking place under conditions of informality, confidentiality and accommodation.⁸⁷

On the other hand, there are other groups which do not enjoy as close a relationship with government policy-makers. Groups in this category may be issue-oriented; that is, organized on a temporary basis to pursue a specific issue. Others may be perceived as politically or economically marginal, representing some section of society not perceived by government officials as having sufficient political power to warrant special consideration.⁸⁸ Such groups usually have limited resources, no permanent organization and comparatively little expertise. They possess few bargaining "trade-offs." Consequently, there is little or no exchange of information on the basis of a mutuality of interests. The interaction of such groups with government officials can be characterized as being adversarial rather than accommodating, and they must rely on making an impact on the media or opposition parties in order to have any effect on the policy-making process.

87 Itzhak Galnoor, "The Information Marketplace," in Government Secrecy in Democracies (New York, 1977) 77-92.

88 For a discussion of the typology of interest groups, see Pross, "Pressure Groups," op.cit.

It has been argued that the unequal ability of some groups to gain easier access to government policy-makers and information has the following effects. Firstly, policy-making tends to deal with piecemeal changes rather than long-range planning; second, weak or inexperienced groups have difficulty penetrating the policy process; third, the existing distributions of political power are maintained; and finally, criteria used for evaluating the basis for allocating resources is restricted.⁸⁹

K. The General Public

The policy impact of the general public is, in a sense, all pervasive, given that in a democratic society governments are expected to respond to the needs and demands of its citizens. In the political marketplace, votes decide which party will hold office. Governments neglect the public mood at their own peril. Hence their reliance on opinion poll surveys, constituency meetings, letters from citizens, and media reports to assess the mood, expectations, and reactions of the citizen to government proposals and existing services and programs. Further, as will be indicated in the next chapter of this paper, the government of Ontario has developed a variety of formal mechanisms for facilitating public involvement in the formulation of public policy.

89 Presthus, Elite Accommodation in Canada, 348-352.

Yet, it is very difficult to develop any meaningful measure of the significance of public participation in these processes. Nor can one easily measure what the public impact is on the policy process relative to that of interest groups; nor what the responsiveness of government officials is with respect to the policy demands of the general public relative to special interest groups. As indicated earlier, however, it is evident that such groups enjoy special advantages with respect to access to the policy process and to the information gathered by that process. Although the advantages enjoyed by special interest groups relative to the ordinary citizen may in part be the outcome of our tradition of administrative secrecy, we must recognize that the extent to which citizens would like to be more involved in the political process than they now are remains obscure.

Presthus has emphasized that Canadian political culture can be characterized as exhibiting "deferential patterns of authority and hierarchy," with the result that "citizens may be more prepared to delegate power and influence to political elites."⁹⁰ Hoffman, on the other hand, has revealed that greater political activity is associated with those citizens who have received university educations, have higher incomes and high status occupations.⁹¹ The Ontario Committee

90 R. Presthus, "Aspects of Political Culture and Legislative Behaviour," International Journal of Comparative Sociology, XVIII, nos. 1-2, (March-June, 1977) 11.

91 Hoffman, op.cit., 277-279.

on Government Productivity's position paper on citizen participation recognized this fact and went on to predict that citizens' demands for participation would increase over time.

Levels of education are bound to increase. Our communications media will expose us to more and more examples of others participating. Organizations are becoming larger and more complex; and governments show no sign of decreasing their involvement in our lives. The rate of technological change probably will continue to accelerate; and the young, as they enter the working force, will bring new ideas and attitudes to bear upon our institutions. All these factors, then, suggest an intensified rather than diminished set of forces for participation.

92

CHAPTER IV

AN OVERVIEW OF THE POLICY-MAKING PROCESS IN ACTION

In the previous two chapters the policy-making structures at the Cabinet and ministry levels were described, as were the principal actors and participants in this process. In this chapter, these structures and actors will be placed within the context of the policy process; that is, within the stages and procedures that constitute the ongoing activity of policy formulation. The legislative process will also be briefly described with special attention paid to MPPs' ability to gain access to government information and documents. Lastly, the budgetary process will be singled out for special consideration.

Before proceeding, however, a few preliminary remarks may be useful. As indicated previously, the COGP sought to balance the policy roles of civil servants and ministers. The COGP report explicitly recognized that the role of the former had increased and there was therefore a need to restructure the Cabinet in order to reassert the role of ministers in the policy process. This attitude is well-founded in the traditional view whereby elected politicians make policy decisions, while civil servants implement and administer these policy decisions. Our constitutional conventions of ministerial responsibility, coupled with civil service anonymity and political neutrality prescribe that civil

servants play a secondary role to that of ministers in the policy process. However, students of politics and public administration have questioned whether in practice civil servants do not in fact play a larger role than our conventions have assigned them.⁹³ The growth of government in terms of programs and specialized bureaucracy,⁹⁴ and the increasing use of delegated authority⁹⁵ have tended to blur the distinction between policy and administration. More and more civil servants are asked to make decisions which have a policy content. In the view of one political scientist:

The conventional view that a clear division may be made between policy and administration has always been a fiction but has become increasingly untenable with the continuing growth of government activities and of administrative power. 96

Not to take notice of the role of civil servants in the policy-making process would likely lead to a distorted view of what that process entails.

93 For a discussion of this issue see Peter Self, Administrative Theories and Politics (Toronto and Buffalo, 1973), c. 5; also see Kenneth Kernaghan, "Politics, Policy and Public Servants: Political Neutrality Revisited," Canadian Public Administration, 19, no. 3 (fall, 1976).

94 On the provincial level this fact is explored by J.E. Hodgetts and O.P. Dwivedi, Provincial Governments as Employers (Montreal, 1974).

95 See Dawson, op.cit., c. 14; also Schindeler, op.cit., c. 7.

96 Kernaghan, op.cit., 437; also see Mallory, "Responsive and Responsible Government," op.cit.; and Deutsch, op.cit.

Moreover, recognition has to be given to the fact that the policy-making process is not self-contained within government; it operates in a social, political and economic environment from which it draws policy inputs or demands.⁹⁷ Here notice must be taken of various pressure or interest groups and their interaction with government, particularly their interaction with civil servants.⁹⁸

At the same time, the process has to be extended down from the Cabinet to the ministry level, since to concentrate only on the Cabinet would in effect cut the process in two. To join the ministry level with the Cabinet level in policy-making is to recognize that the process operates, as far as functional structures and policy personnel are concerned, in what has been called the "executive-bureaucratic" arena.⁹⁹

In order to describe and understand the patterns of activity that occur within the policy process, analysts have employed elaborate conceptual schemes to characterize this process. Here a more simplified approach will be taken, one based on the identification of three inter-related stages. The first is the initiation stage, which begins when an issue

97 For a concise exposition of government as a system of inputs, outputs and feedback see the introductory chapter in Van Loon and Whittington, op.cit.

98 See cited works of Presthus and Pross.

99 Doern and Aucoin, op.cit., 267.

or problem is identified as requiring government action or decision. The next stage involves the study of the problem and the preparation of policy alternatives. Finally, the alternatives must be reviewed and a decision made on what option the government will follow. That decision will be made either by the Cabinet, a minister or civil servant, depending whether the policy instrument used for implementation is either a statute, regulation, order-in-council, or delegated authority. In the following pages, the focus will be on the three stages as these involve any given ministry and the Cabinet. Finally, the role of the Ontario legislature will be discussed with respect to those occasions when the policy instrument used is legislation.

A. The Ministry Level

The ministry level in the policy-making process encompasses those units of administration, program delivery, research, policy analysis, etc., that constitute the ministry's organizational structure. All of these units and divisions can, depending on the issue, be involved in policy formulation, particularly at the initiation stage when policy issues or demands are identified.¹⁰⁰ An operational unit administering a program or providing a service, for example, can alert the ministry's

100 Van Loon and Whittington, op.cit., 21, suggest that provincial ministries or departments, especially in the larger provinces, play an increasingly important role in policy initiation.

senior officials to a problem requiring a policy decision or "output." That demand may also come from the ministry's special client group with which the officials will have contact.¹⁰¹ A regional office can similarly inform the ministry's policy-makers that a program or service is inadequate and needs re-evaluation. Further, a ministry may receive representations from interest groups such as the Canadian Manufacturers' Association or the Ontario Federation of Labour which will often particularize their priorities with respect to some issue or problem. In fact, at this early stage, initiatives can come from a variety of sources both internal and external to government. A minister, the Cabinet, MPPs, policy field secretariats, interest groups, special client groups, local governments, the federal government, the media, and the general public acting through the media or survey polls, can demand some policy decision, or policy output.

This early policy initiation stage can be characterized as an information gathering process in which expectations, demands, and values are communicated to the policy-makers in the executive-bureaucratic arena. Once the particular policy issue is identified, it may be that the matter can be resolved by a senior official or by the minister acting on the advice of one of his officials. For example, if the Ontario Nurses' Federation sought a change in the criteria which established

101 While in some instances client group and interest group may be the same, client group here is distinguished from the latter in that it is more closely dependent on the ministry than an interest group.

that less qualified nursing assistants could perform some of the same duties as fully-qualified nurses, the governing statute may permit the senior official, acting alone or in consultation with his minister, to make a decision and set a policy in respect to that demand. These types of decisions with their own policy content are made in thousands of cases where a statute delegates authority to a minister or senior civil servant.

Of greater interest here, however, are policy decisions which ultimately surface for resolution in the Cabinet, and under some circumstances, in the legislature. Where new or changed legislation, or a regulation under a statute, or an order-in-council is required, the matter will obviously have to go to Cabinet. Similarly, items requiring either the expenditure of funds not already provided for, or the hiring of new staff, will need to gain approval outside the ministry. Even though the matter has none of these requirements, it may still be referred to Cabinet or cleared with the Premier if it deals with a sensitive area of public policy and has political ramifications needing discussion at that level. Usually the amount of resources needed to develop a policy proposal of any significance will be such that the approval of senior management in the ministry will be required before they can be mobilized.

The actual decision to examine an issue or problem may arise in several ways. The minister, having discussed the matter at Cabinet level, might

direct his staff to prepare a report or memorandum which analyzes the problem and makes a series of recommendations or offers several options. Or, the matter might first be raised at a meeting of the ministry's executive or management committee. The management committee, comprised of senior administrators -- the deputy minister, assistant deputy minister, and directors -- meets usually once a week. The committee, chaired by the deputy minister, serves several functions; as a forum for exchanging information on what the various divisions of the ministry are doing, or on what is being done in other jurisdictions, and as an evaluator of existing programs and new policy proposals. In some ministries, there is also an executive committee on which the minister sits.

The study and analysis process which would commence at this point could be either relatively simple and short, or complicated and time-consuming. If the latter, the background material will be prepared usually by the research or policy analysis units in the ministry, then reviewed by the legal staff. If there are expenditures involved, the matter will be assessed by the branch responsible for the ministry's financial management. Information in the form of statistical data, previous reports on the matter prepared by the ministry, reports of other jurisdictions, reports of field offices, and submissions from interest groups, etc., may be gathered and analyzed. In circumstances in which an issue involves policy and expenditure considerations that impinge on existing programs or other ministries, the matter may be

studied by an inter-ministry committee or task force, or in unusual cases, by a royal commission. The creation of inter-ministry committees or task forces will normally require Cabinet approval, while an order-in-council will establish a royal commission. In addition, on some issues the ministry may employ outside consultants. It should be noted here that at this stage, the staff of the relevant policy field secretariats may be involved to some extent. It is possible, indeed, that the major carriage may be by one of the secretariats.

Most, if not all, policy demands involve the spending of public money, and some have economic implications for the provincial economy,¹⁰² particularly in those areas of provincial responsibility -- health, social welfare, transportation, education and natural resources -- that have seen tremendous growth in government expenditure.¹⁰³ Policy options developed during the study and analysis stage and which have expenditure implications, would be set against existing government objectives and priorities. At a time when the Ontario government is committed to reducing the level of public expenditure,¹⁰⁴ any policy proposal or option involving the use of public monies to provide a new

102 These implications are discussed by Clarence L. Barker, Theory of Fiscal Policy as Applied to a Province, A Study Prepared for the Ontario Committee on Taxation (Queen's Printer, n.d.).

103 William H. Chandler and Marsha A. Chandler, "Policy Trends," in Bellamy, et al., op.cit.

104 See Report of the Special Program Review, 1-6.

service or program would be scrutinized and assessed by Treasury, Economics and Intergovernmental Affairs, to see if it complied with the above objective. At the same time, Management Board would also be consulted, and would review the proposal to determine its feasibility in the context of the government's existing expenditure resources.¹⁰⁵ If the proposal impinged on existing programs or services of other ministries, the cross-ministry implications would be discussed with those ministries. At this stage also, senior policy managers (either the minister or his senior civil servants) could consult interest or client groups as to their expectations and views on the issue. Policy options, in general terms, could be discussed with these groups, though actual dollar figures would seldom be mentioned, lest expectations be raised that the government would or could not fulfill.

Ministry officials at this stage may be keen to gain information from such groups. Basically two types of information could be sought -- technical and political. The former would comprise such matters as whether existing programs or services are functioning properly, what the administrative or legal defects of the proposed program are, and

105 The considerable policy role and influence of these so-called central agencies have come under recent scrutiny by political scientists. For their impact at the federal level see Richard W. Phidd and G. Bruce Doern, The Politics and Management of Canadian Economic Policy, (Toronto, 1978); Colin Campbell and G.J. Szablowski, The Super-bureaucrats: Structure and Behaviour in Central Agencies, (Toronto, 1979); for provincial equivalents see Kenneth Bryden, "Cabinets," op.cit.

so on. Political information, on the other hand, would comprise such matters as whether the group's leadership or membership would more likely support one option over another, or whether the leadership could ensure the compliance of its members even if the policy option finally adopted was unsatisfactory to them.

When a rough working paper of the final report or memorandum is prepared, which may include some or all of the kinds of information discussed previously, the deputy minister or assistant deputy minister, whichever has supervised the research and analysis, will receive the internal ministry reactions to the report or policy proposal either at the management committee or by memoranda. The deputy minister will then make his final assessment and brief the minister who will either approve or reject the proposal, or seek its modification. If the latter course is adopted, the document will be referred back for further consideration and revision -- sometimes more than once. After refinement and ultimate approval by the minister, it will be drawn up as an official and confidential Cabinet Submission document and sent to the Cabinet Office.

B. The Cabinet Level

Once the Cabinet Office receives a Cabinet Submission document, it is reviewed by the Secretary of the Cabinet and his staff, to ensure that

it has been drawn up in the appropriate form, and that all necessary analyses and supporting documents are included. The submission having thus been reviewed will usually then be forwarded to the appropriate policy field committee. When an issue is urgent or politically sensitive, the matter may be sent directly to full Cabinet, as, for instance, when a ministry having consulted other ministries in the policy field has concluded that a consensus on the issue would not be possible, or when the issue is sufficiently pressing that abbreviated procedures have to be followed. If the proposal does go before a policy field committee, the latter would make a recommendation that the proposal be approved or rejected before being passed on either to the Policy and Priorities Board or to Cabinet for final decision.

Policy field committee review is based on an examination of the established priorities of the field as these have been formulated by the participating line ministers. Discussion at this level is directed to ascertaining whether or not the proposal is likely to achieve its stated objective, whether the suggestion is in any way in conflict with programs of other ministries in the policy field, and whether on balance, it is a good thing with which to proceed. Although cost implications are of very great importance, they do not tend to be paramount in discussions at this level, except of course during the annual budgeting session when the committee is involved in trying to allocate the global allotment to that policy field among the composite ministries.

The chairman of the committee, the Provincial Secretary, has no power to compel agreement or to impose his own judgment. His role is to act solely as coordinator of the policy discussions. In this capacity, he is aided by his own Secretariat, a small group of policy analysts that would have evaluated the proposal before it was discussed in the committee. One former Provincial Secretary has described his function in the following terms:

Provincial Secretaries are not themselves responsible for policy in the related operating ministries, but are responsible for coordinating the policy efforts of these ministries so that any inconsistencies can be avoided and new thrusts identified ... In the same view, a Policy Minister does not have a veto power over the policy proposals of operating ministers. Because they chair the meetings of a policy field, however, they are able to make significant contributions to the discussions of particular items and in effect influence their acceptance or rejection at the policy field level. 106

Clearly, the Provincial Secretary's ability to influence the discussion and the resolution of any conflict will be dependent on a variety of factors, including the quality of information he receives from his own Secretariat, his own political standing in the government, and the extent to which the Premier has confidence in him.

At the policy field committee level the proposal will receive intense technical evaluation by senior civil servants and deputy ministers.

106 Mr. Robert Welch, quoted in Mary Jo McLaren, "The Committee on Government Productivity and its implications for the Policy-Making Process in Ontario," (unpublished manuscript, March, 1976) 22.

The ministers will, at this stage, have an opportunity to assess and weigh the substantive issues in the policy proposal as analyzed by their advisors and will bring their political judgment to bear on the matter. This interaction of expert knowledge and political judgment should ordinarily produce a consensus.¹⁰⁷ The policy field committee is not, however, a final decision-making body.¹⁰⁸ It will only make recommendations that will go before full Cabinet after a further review is made, in the usual case, by the Policy and Priorities Board.

The policy field committees may also constitute an access point for outside publics to try to influence the policy actors at this level. Usually the procedure is for the group to send a formal brief which can then be discussed in confidence at an oral presentation. There also have been occasions when the policy field committees have conducted open sittings around the province, soliciting views and opinions from interested publics on matters relevant to the policy field ministers.¹⁰⁹ How far such encounters result in changes or additions to the original policy proposal cannot be easily assessed. As has been described, a great deal of bargaining, negotiating, and consensus building may have gone into the proposal at the ministry level. If so, the likelihood

107 Bryden, "Cabinets," op.cit., 321.

108 This appears to be the view of ministers in 1976, see Simeon, op.cit., 58.

109 See McLaren, op.cit., 28-29, for confirmation of this by several ministries.

that a group will materially influence the shape of the proposal at this stage is considerably diminished.

If the policy field committee has made an affirmative recommendation, and the proposal involves public expenditure, Management Board will be consulted. The Ontario Manual of Administration lists the items that require a review to be made by the Board:

- . multi-year plans
- . proposed legislation having financial or significant administrative implications or bearing on the program(s) of another ministry or agency
- . proposed agreements with the Governor of Canada, municipalities or other jurisdictions having a financial or significant administration implication and requiring prior approval of the Lieutenant Governor in Council
- . proposed regulations having a financial implication. 110

Many new policy proposals would fall into one of these categories. For example, if a proposal sought an expansion of a particular ministry service that required additional expenditure outlays and personnel, the Board would analyze costs in relation to the gross amount of money allocated to that particular policy field and place the projected costs contained in the proposal within that gross amount and the specific amount allocated to that particular ministry. Having reviewed the

110 For a complete list of items, see Ontario Manual of Administration, vol. I, 10-14.

matter, the Board may decide that new expenditures could not be rationalized within existing budget constraints, or that the number of new staff requested is not really necessary.¹¹¹ The Board must be satisfied that the requested expenditures accurately reflect actual needs, and at the same time, government expenditure priorities. Technical analysis and calculations would be provided by the Management Board Secretariat, which provides specialized expertise in financial and personnel management. Once the proposal has been analyzed by the Secretariat, the Board reviews its findings and makes an appropriate recommendation. As Management Board is comprised of the Ministers of Treasury, Economics and Intergovernmental Affairs, and Government Services, as well as the Provincial Secretaries, inputs from these ministries will be brought to the Board's deliberations. TEIGA, in particular, would comment on the proposal's implications with respect to its areas of responsibility.

In the normal course, the proposal would then move on to the Policy and Priorities Board which will assess the Management Board's recommendations and determine whether the proposal can be justified in the context of the government's long and short-term goals, and whether the expenditures foreseen in the proposal are consistent with the government's overall budgetary and fiscal policy. Here again, the

111 See comments by Mr. Robert Welch in Szablowski, op.cit., 121-122.

Minister of Treasury, Economics and Intergovernmental Affairs will have the opportunity to influence the decision. It is conceivable, for example, that if the proposal entails considerable budgetary outlays, he might well argue that this would be contrary to the government's expressed policy of reducing the growth of provincial spending, or that existing programs need to be cut back rather than expanded.¹¹² It is probable that the discussion in the Policy and Priorities Board would be conducted at a more general plane than previous assessments. The proposal would be assessed in the light of what the ministers perceive to be the "public interest." In other words, the discussion would turn on broad political considerations. To aid in that deliberation, the following information would ordinarily be relied upon:

- . original Cabinet Submission presenting the policy options and recommendations as set out by the ministry
- . the recommendations of the policy field committee
- . Management Board assessment
- . TEIGA review
- . assessments made by the Policy and Priorities Board Policy Secretariat.

Because the Policy and Priorities Board is small and composed of the Premier as chairman, and has a broad policy coordinating function prescribed by statute,¹¹³ one might expect it to be in effect, the

112 In 1975 the Treasurer did recommend such policies in The Report of the Special Program Review, 6.

113 Policy and Priorities Board, 1971, S.O., c. 13.

final decision-making body. This certainly was the role envisaged for it by the COGP. However, a recent analysis has indicated that in fact the full Cabinet still retains that function.¹¹⁴ The fact that full Cabinet remains as the final decision-making body may reflect the relatively small size of the Ontario Cabinet. Moreover, the British concept of the inner Cabinet does not seem to have taken hold in the Canadian political experience.¹¹⁵

The Cabinet system in Canada does follow the Westminster model, in that Cabinets are the "core" policy-making body in government.¹¹⁶ The traditional constitutional principles governing Cabinet behaviour are collective responsibility and solidarity. While recent changes in these principles as they reflect practical situations have been noted,¹¹⁷ they still underlie political reality. Cabinet decisions are reached on the basis of confidentiality that allows the frank and open exchange of political judgments between ministers. In this atmosphere, it is argued, a consensus can be established which provides the basis for

114 Simeon, op.cit., 55-58; for a different interpretation, see Bryden, "Cabinets," op.cit., 320.

115 See F. Schindeler, "The Prime Minister and the Cabinet: History and Development," in Thomas A. Hockin, ed., Apex of Power, (Scarborough, 1977).

116 W.A. Matheson, The Prime Minister and the Cabinet, (Toronto, 1976) c. 1.

117 See A.H. Birch, Representative and Responsible Government, (Toronto, 1964), c. 10.

collective responsibility or accountability for government policy. The degree of confidentiality which is necessary to ensure collective responsibility is open to argument. It is clear, however, that a tradition of Cabinet secrecy is well entrenched in Ontario. It is reflected in the requirement of the swearing of oaths of confidentiality by members of the Ontario Executive Council,¹¹⁸

Before turning to the legislature and its role in the policy-making process, notice should be taken of the growth of the advisory role of the various Cabinet secretariats. With the creation of the system of Cabinet sub-committees and the introduction of the "new management style" that emphasized "rational" decision-making,¹¹⁹ the need arose for special policy advisors attached to the various sub-committees. Some advisors constitute the Secretariats in Provincial Secretaries' offices, others the secretariats forming the Cabinet Office and the Premier's Office. These civil servants not only prepare agendas and record decisions, but also influence the policy process by providing technical advice and analytical skills to the various Cabinet committees. The extent of their policy influence is difficult to measure. No studies have appeared which analyze the role of what are called central

118 Ontario Cabinet members are required to swear three oaths: Oath of Allegiance, Oath of Office, Oath of the Member of Council. Schindeler, op.cit., Appendix A.

119 For a discussion of what "rational" policy-making entails, see Laurent Dobuzinkis, "Rational Policy-Making: Policy, Politics, and Political Science," in Hockin, op.cit.

agency policy actors at the Ontario level,¹²⁰ though considerable interest has been shown in the activities of these "super-bureaucrats" at the federal level. One recent study¹²¹ claims that their policy influence has grown along with the growth of the central agencies themselves, and that they may employ discretionary judgment equal to elected ministers -- a situation which raises the complicated issue of administrative accountability. On the other hand, another study argues that the policy influence of civil servants acting as policy advisors in central agencies is exaggerated, and that operating departments or ministries do retain considerable policy influence since the latter are major sources for both policy initiatives and the preparation of policy options.¹²² Perhaps more important than the issue of whether one set of non-elected administrators and advisors are more influential than another is the fact that civil servants and political appointees in general, regardless of what organizational structure they operate from, have a substantial, if ill-defined, influence in the policy-making process.

120 In the Ontario context, "central agencies" would comprise the Premier's Office, the Cabinet Office, the Committees of Cabinet, especially Management Board and Policy and Priorities Board, and the Ministry of Treasury, Economics and Intergovernmental Affairs.

121 C. Campbell and J. Szablowski, op.cit., c. 7.

122 See Richard Schultz, "Prime Ministerial Government, Central Agencies, and Operating Departments: Towards a More Realistic Analysis," in Hockin, op.cit., c. 19.

C. The Legislative Level

Once Cabinet has approved a proposal which must then be introduced in the Assembly as new legislation, the draft statute is reviewed by the Legislation Committee of the Cabinet. When all drafting problems have been resolved and a time set for the bill's introduction into the House by the responsible minister, the bill will first be taken to the government caucus. The caucus is comprised of the government party backbenchers who, not being Cabinet ministers, do not have a formal role in the policy formulation process. The caucus's approval is necessary if the bill is to gain party support in the House. Caucus approval will secure passage in the House if the government party has a majority. Caucus approval is also critical, of course, in the context of minority government. The significance of caucus approval is evident in the current practice of inviting the government Whip to sit in on Cabinet meetings in order to transmit the views of the caucus members to ministers.

If the minister responsible for the bill is assured of caucus support, he may then table the bill in the House, and take this opportunity to explain the purpose of the legislation. At the same time, the minister will table a compendium of background information, to be stored in the Legislative Library, relating to the proposed legislation. Second Reading follows, allowing for debate on the matter in principle. Upon the request of a member and agreement by the responsible minister, the

draft bill will be sent either to the Committee of the Whole House or to a Standing Committee where it will be considered in detail and any amendments introduced.

Several different standing committees function in the Ontario legislature. Some correspond to the policy field — Social Development, Justice and Resources Development -- and scrutinize draft legislation in these fields. In addition, there are committees dealing with General Government, Members' Services, Procedural Affairs, and Statutory Instruments. Ontario also makes extensive use of ad hoc select committees that undertake special investigations. A large proportion of draft legislation is, however, sent to the Committee of the Whole.¹²³

It is at the committee stage that policy proposals in the form of draft bills will receive scrutiny and criticism. However, as has been often noted by observers of parliamentary politics, the ability of members to have a significant impact on legislative proposals is considerably diminished by their lack of expertise and information.¹²⁴ By the time a draft bill reaches the legislature, the matter has been debated, analyzed and refined by experts in the ministry and at the Cabinet level.

123 This was the finding of Ontario Commission on the Legislature Fourth Report (September, 1975) 14.

124 Van Loon and Whittington, op.cit., 423; also Camp Commission, Second Report (December, 1973) 49.

Further, at the committee stage it is not always the case that information from interested publics will be forthcoming. Interest groups have come to recognize that in order to make any significant impact on the policy-making process, they need to consult and influence policy-makers at the ministry and Cabinet levels,¹²⁵ when the policy proposal is still in its early and formulative stage. Moreover, the usefulness of civil servants as witnesses before committees is circumscribed by the principles of ministerial neutrality.¹²⁶ These conditions have produced a situation in which the legislature and its committees have seen their policy role substantially weakened in comparison to that of the bureaucracy and the Cabinet.¹²⁷ The result has produced, in the opinion of some observers, a serious political dysfunction in Western democracies.¹²⁸

Recent debate on this subject in Canada, at least at the federal level, has proceeded apace, particularly as a result of the election in 1979

125 Presthus, Elites, 198.

126 The Ontario Commission on the Legislature, Fourth Report, 69, argued that such principles would not be seriously jeopardized if a civil servant appeared alone before a committee of the legislature, so long as both the civil servant and the committee members accepted the limitations these principles place on civil servants.

127 As the Camp Commission, however, pointed out in the case on Ontario, MPPs themselves need to take some of the blame for this situation, due to their neglect to pursue their rights and privileges more aggressively.

128 See Schindeler, op.cit., 261; also see Donald C. MacDonald, "Modernizing the Legislature," in MacDonald, op.cit.; and Bacher, "The Crisis of Modern Parliaments," in Macridis and Brown, op.cit.

of a Conservative government in Ottawa, which had publicly committed itself to altering parliamentary procedures in order to strengthen the role of Parliament. In addition, this issue has been raised by the federal Royal Commission on Financial Management and Accountability which, among other things, advocates a stronger role for Parliament in overseeing the activities of the executive.¹²⁹ Scholars and other political observers have also contributed to the debate by pointing out the serious consequences of the decline in the role of Parliament in the policy process.¹³⁰ Some argue that any hope for the reassertion of Parliament at the federal level depends, in part, on the implementation of greater access to government information.¹³¹

It may be useful, therefore, to examine in some detail the extent to which members of the Ontario legislature have access to government information. At the outset, it must be recognized that there are no specific statutory provisions recognizing a member's right to government

129 Royal Commission on Financial Management and Accountability, Final Report (March, 1979).

130 See, for example, the special edition on Responsible Government in Journal of Canadian Studies, 14, no. 2 (summer, 1979); and W.A.W. Neilson and J.C. MacPherson, The Legislative Process in Canada: The Need for Reform, Institute for Research on Public Policy (Toronto, 1978).

131 D.G. Hartle, "The Report of the Royal Commission on Financial Management and Accountability (The Lambert Report): A Review?" Canadian Public Policy/Analyse de Politique, V, no. 3 (summer, 1979); and G. Bruce Doern and Peter Aucoin, "Public Policy Organization, Process and Management: Concluding Observations," in their book, Public Policy in Canada, (Toronto, 1979) 308.

information; in fact no such right legally exists. What MPPs do have is the opportunity to ask for information. Whether the minister from whom this information is sought will comply with that request is a matter governed by constitutional conventions -- ministerial responsibility in particular -- and the rules of the House as laid down in the Standing Orders.¹³²

Standing Order no. 27(a) recognizes the right of members to place questions on the Order Paper seeking government information. Provisional Order no. 10 stipulates that written questions must be dated, and that the minister has 14 days in which to reply. It is well accepted, however, that a permissible reply may be that the answer is too "costly or time-consuming to prepare," or simply, that the minister declines to answer. As Order no. 27(i) states, "A Minister may in his discretion decline to answer any question."¹³³ This Order expresses the principle of ministerial responsibility which recognizes that only the minister is in a position to judge whether the requested information should be provided. It has been traditionally accepted that a minister "may refuse to answer a question asking an expression of opinion upon public policy."¹³⁴ In addition, a minister may refuse to answer a question on the ground of public interest; and a question so refused

132 Legislative Assembly of Ontario, Standing Orders, (1970).

133 Ibid., 18.

134 Alex C. Lewis, Parliamentary Procedure in Ontario, (Toronto, 1940) 45.

cannot again be placed on the Order Paper. A member cannot plead such a refusal as a matter of privilege, nor can it be used as grounds for moving the adjournment of the House.¹³⁵ The grounds for refusal cited above apply to both written and oral questions.

Another possible vehicle of information access is the procedure that permits members to give Notice of Motion for the Production of Papers.

When called, the motion permits a more wide-ranging debate -- in terms of time and participation -- on whether or not the information should be produced. However, under present circumstances, such a motion can only be called during Private Members' Hours. 136

The Camp Commission, however, concluded that since there were relatively few such Private Members' Hours at the time of its research,

a separate time ... be set aside to debate those motions to which Ministers refuse to respond. If there were no motions for production of papers on the Notice Paper, the Legislature would revert to regular Privacy Members' business. 137

Where the government controls a majority in the House, however, such motions obviously cannot compel the production of documents which the government would prefer not to disclose.

A further point of information access arises from Provisional Order no. 8, which provides for the tabling of a compendium of background

135 Ibid.

136 Camp Commission, Fourth Report, (September, 1975), 41.

137 Ibid., 42.

information after any ministerial policy statement or introduction of a government bill. This Order is based on a recommendation made by the Camp Commission:

In the British House of Commons, we have noted, each item of new legislation is accompanied by at least some of the relevant reports and studies undertaken by, or available to, the Ministry. This compendium of background is prepared by the Ministry and placed in the Library at the time of First Reading for use of the Members who may then use the material as background, and to familiarize themselves with the nature of the legislation.

138

The words to notice are "at least some," and "undertaken by, or available to." As guides for ministry officials, they permit considerable latitude in deciding what information is to be provided. Conceivably, a ministry may include in the compendium only such documents as articles, books or reports written by non-government experts, yet still conform to the guidelines as expressed in the phrase, "or available to."¹³⁹ In short, the guidelines provide ministry officials with a choice as to whether they will or will not provide internally written reports.

The ability of individual members to gain access to government information or documents would seem to be circumscribed both by the

138 Camp Commission, Second Report, 50.

139 For example, the Compendium for The Mental Health Amendment Act, 1978, deposited in the Legislative Library, consists largely of articles selected from established periodicals and reports from other jurisdictions, as well as the policy statement of the minister. No internal reports or memoranda were submitted.

discretion ministers possess and by the vagueness of guidelines with respect to the tabling of background compendia. On the other hand, the legislature and its committees do possess the legal power to ask for and receive information and documents from any source, including the government. Section 35 of The Legislative Assembly Act states:

1) The Assembly may at all times command and compel the attendance before the Assembly or a Committee thereof of such persons, and the production of such papers and things, as the Assembly or committee considers necessary for any of its proceedings or deliberations.

2) When the Assembly requires the attendance of a person before the Assembly or a Committee thereof, the Speaker may issue his warrant directed to the person named in the order of the Assembly or committee and the production of the papers and things as ordered.

140

Whether the Assembly or its committees decide to compel the production of any documents from the government depends on a majority vote of members. In a situation where the governing party has an absolute majority in the House, and therefore also in the committees, there is less likelihood that section 35 will be invoked, while theoretically at least, under a minority government the possibility of section 35 being invoked increases considerably.¹⁴¹

In practice, however, a committee will ordinarily not make recourse to section 35, but will ask informally that government officials and/or

140 Legislative Assembly Act; R.S.O. 1970, c. 208, s. 35.

141 The assumption here is that a governing party will vote consistently against the opposition's demand for a Speaker's Warrant.

ministers appear before it. If specific documents are called for, committee members have traditionally respected the confidential nature of some documents, as well as the right of ministers to use their discretion by neither attending nor producing the requested documents. However, if a majority of committee members were unsatisfied and were to persist in seeking the production of certain documents, and provided that a majority in the Assembly concurred, the committee chairman could then ask the Speaker to issue a Speaker's Warrant. Standing Committees are not invested with the power to approach the Speaker directly. The exceptions are Select Committees which, because they sit when the legislature is not in session, can be given the power to seek a Speaker's Warrant without first submitting the request to the House.¹⁴² A Speaker's Warrant can be directed not only at civil servants but also at ministers, and "the minister does not have any discretion if a Speaker's Warrant is issued."¹⁴³ However, while a minister can, in this manner, be compelled to appear before a committee, he "cannot produce any document, the production of which is prohibited by law, such as a Cabinet document."¹⁴⁴ While no statute exists explicitly

142 This has been confirmed by Mr. A. McFedries, Assistant Clerk, Office of the Clerk, Legislative Assembly of Ontario. This procedure may be somewhat of an anomaly since one would assume that when the Assembly delegates to a committee the powers of section 35, such powers would include that of seeking a Speaker's Warrant without first gaining the approval of the House.

143 Mr. Roderick Lewis, Q.C., Clerk of the House, Legislative Assembly of Ontario, in a letter to the author dated June 12, 1978.

144 Ibid.

prohibiting the production of Cabinet documents, their confidentiality is prescribed by the conventions of ministerial responsibility and Cabinet solidarity, and by the oath of Member of the Executive Council,¹⁴⁵ which requires every member of the Cabinet to keep secret all matters debated and resolved in the Executive Council.¹⁴⁶

The relationship of the doctrine of Cabinet secrecy to the availability of documents poses a number of problems. Assuming that all Cabinet documents need to be kept confidential, does this rule cover only documents in the possession of the Cabinet and its sub-committees, or also those in the possession of the Cabinet Office but which have not yet been sent to Cabinet or its committees? Does the rule extend to cover all documents intended to be sent to the Cabinet at a future time? The policy-making process, as described previously, begins in the ministry with reports, studies and recommendations that go before the executive committee of the ministry and the minister, and which then are turned into Cabinet Submission documents. It is difficult to sustain the argument that all background studies which may form part of Cabinet Submissions are Cabinet documents.

If, on the other hand, the intent of Cabinet confidentiality is to ensure that policy matters (the responsibility of Cabinet) are kept in

145 Executive Council and Cabinet are used here interchangeably; for a precise definition of each see Schindeler, op.cit., 29.

146 This oath is reproduced in Schindeler, Appendix A.

confidence, then all policy documents intended for Cabinet submission — at any stage in the policy-making process — ought to be likewise protected. It is evident from Standing Order no. 27(i), which recognizes a minister's discretion to decline to answer any question, that policy documents in this broad sense can be protected from publicity in the legislature. At the present time, a minister's discretion in these matters is clearly absolute and overrides any perceived need on the part of opposition MPPs to automatically gain access to these documents. For the moment, MPPs only receive policy documents in response to informal or formal requests and through the compendium of background documents.

The Camp Commission viewed the then current level of MPP access to government information as problematic, and suggested measures to improve the flow of information to the legislative members. One such measure was the tabling of a compendium of background material after a ministerial statement or the introduction of a bill.¹⁴⁷ The Commission argued, however, that while such practical measures as the compendium could increase the flow of information, the existing rules of the House could be more effectively used by the members in pressing the government for

147 Opposition MPPs and their research staff, however, have indicated that the documents tabled in the compendium are of uneven quantity and quality; see also Sean Conway, MPP, Notes for Presentation on Behalf of the Official Opposition to the Commission on Freedom of Information and Individual Privacy, (October 19, 1978).

information.¹⁴⁸ While an aggressive use of the Standing Orders may increase the flow of information from government to opposition members, such aggressiveness may require energy and time which members may feel could be better deployed. Constant confrontation with ministers over whether this or that document should or should not be released could be viewed as unproductive. Arguably, clearer guidelines or some other method, such as a statutory right of access to government information, would be more beneficial to all concerned.

D. The Budgetary Process

The formulation of the budget is critical to the policy process. The formal budget document together with the government's Estimates of Expenditure constitute an explicit statement of the government's social and economic priorities.¹⁴⁹ These documents represent the culmination of a budgetary process which spans twelve months. The process is initiated within the Ministry of Treasury and Economics during April of the calendar year preceeding the beginning of the fiscal year for which the budget is intended.

148 Camp Commission, Fourth Report, 6.

149 For a review of provincial budgeting, see R.M. Burns, "Budgeting and Finance," in Bellamy et al., op.cit.; and Chandler and Chandler, op.cit., 124-132.

Budgeting has increasingly become a planning process whereby the government seeks to allocate increasingly scarce resources -- revenue and personnel -- to competing policies and programs. The process is thus characterized by conflict, negotiation and bargaining.

During the earliest stage of budget formulation, Treasury officials establish a "fiscal framework" to determine the financial and economic constraints under which the process of allocation will occur.¹⁵⁰ This framework constitutes a budget strategy comprising revenue and fixed expenditure forecasts,¹⁵¹ along with a proposed size of deficit which the Treasurer considers appropriate for the realization of the government's priorities. Revenue and deficit projections implicitly establish a total level of allowable expenditures -- a figure which will govern the entirety of the ensuing process. Total expenditure is then resolved by Treasury officials into ten large categories including variable expenditures -- such as salaries and wages, grants to hospitals, medical practitioners, universities, colleges and school boards -- along with invariable commitments, such as interest on the public debt, pension fund contributions and disbursements to municipalities.

150 This description of the budgeting process is based on interviews with officials in the Fiscal and Taxation Branch of the Ministry, and on a Seminar on Budgeting held by the Public Accounts Committee, May 18, 1978.

151 Fixed expenditures include interest in the public debt, and payments to municipalities, which the province is committed to increase at the rate of growth of provincial revenue, etc.

In June, the fiscal framework is complete and is forwarded to the Policy and Priorities Board of Cabinet, and finally to full Cabinet. At this level, discussion revolves around deficit size, total expenditure level and the most major variable cost items. If significant alterations are ordered, the framework is returned to Treasury. Upon final approval, Cabinet will have determined the total quantity of available resources, and will have implicitly sanctioned specific rates of expenditure growth in major governmental programs.

The approved fiscal framework is forwarded to the Management Board Secretariat, which must resolve the ten categories established by the Treasury into allocations for each of the policy fields. In turn the policy fields determine allocations for each of the constituent ministries, during which time, each ministry is establishing its program priorities and estimating their costs. The individual ministries must then respond to their allocations as determined by the policy field. Theoretically, the policy fields act as brokers between constituent ministries in an effort to reduce the budgetary demands of each and consequently to remain within the field's total resource allocation. The structure of the policy fields -- comprising all constituent ministers within each field -- militates against the effectiveness of this procedure. The job of analysis and review of the budgetary demands of individual ministries often falls to the Secretariat of the Management Board and to officials within Treasury.

After much negotiation and compromise, the policy fields submit to the Policy and Priorities Board of Cabinet their recommendations for allocations to the constituent ministries. The Policy and Priorities Board may re-allocate resources between policy fields on the advice of the Management Board Secretariat or the Treasury, in an effort to relieve those ministries and fields utterly unable to achieve even their most significant goals. After ministerial allocations have been approved, the Policy and Priorities Board submits them to full Cabinet for review and subsequent Cabinet approval.

Detailed estimates instructions for each ministry are then prepared by the Management Board Secretariat, which forwards them to the ministry to serve as guidelines in the preparation of actual and detailed ministerial estimates. Finally, these estimates are submitted for analysis and review to the Management Board and its Secretariat.

While detailed estimates are under review at Management Board, Treasury officials are engaged in the preparation of the Provincial Treasurer's Annual Budget Statement. This document is crucial in charting the economic course of the province. It contains an analysis of the state of the economy, changes in taxation and fiscal policy, and announcements of new economic initiatives to be undertaken by the province.

The process of preparation of estimates concludes in March when the Cabinet gives final approval to the provincial budget. At the same time, the Treasurer delivers his Budget Statement in the legislature.

Estimates are debated by the Assembly in Committee of Supply (identical to Committee of the Whole) following the debate on the Treasurer's Statement. With the agreement of the opposition, selected estimates may be referred to one of several standing committees of the legislature. Members of the opposition are provided with briefing books identical to those used by ministers in their defence of estimates. In both the Budget and Supply debates, the ability of the opposition to respond effectively to government claims and initiatives is severely limited by the secretiveness of the budgetary process, by the complexity of the issues at hand, and by critical shortages of expert research staff.

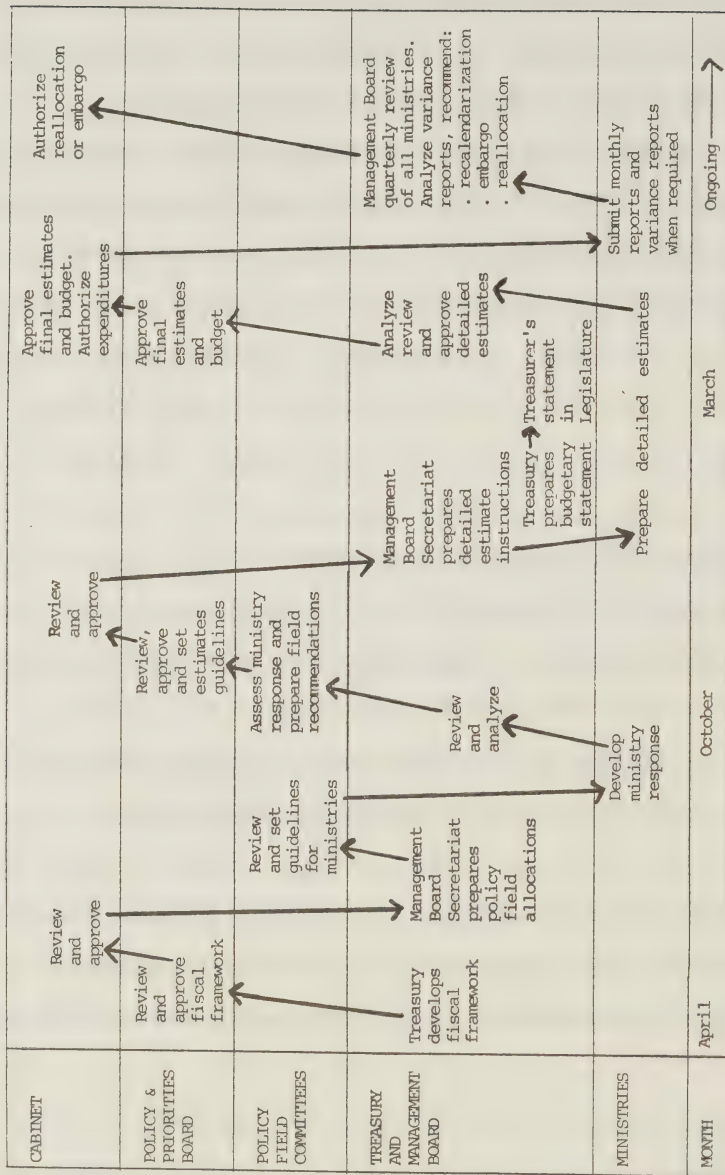
When the substantive determination of budgetary policy is normally considered to conclude with Cabinet's final approval of estimates, the expenditure control program -- undertaken by the government in 1975 in an effort to constrain expanding deficits, maintain fiscal policy flexibility, and protect the province's borrowing capabilities -- ensures that policy decisions occur throughout the fiscal year.

This program facilitates the centralized control of government spending. At the beginning of each fiscal year, all ministries calendarize¹⁵² their anticipated expenditures for the following twelve months. At the

152 Calendarization involves the breaking down of annual expenditures by month.

FIGURE III *

BUDGETARY AND EXPENDITURE CONTROL PROCESSES



* Ontario Legislation, Public Accounts Committee, Seminar on Budgetary Process, June 1978.

end of each month, ministries enter their actual expenditures into a computerized auditing system controlled by Treasury and Management Board. These reports are analyzed quarterly. Significant variance between the calendarization and the actual level of expenditure must be explained to the Management Board Secretariat. If the variance is temporary and due solely to fluctuations in the rate of expenditure, then the ministry is simply instructed to re-calendarize. If, however, the variance is indicative of permanent under-spending or over-spending, Management Board after consultation with Cabinet is empowered to embargo the under-spent funds and re-allocate resources to those ministries experiencing uncontrollable and irreducible over-spending. From the program's inception to the beginning of fiscal 1978, embargoes and re-allocations have shifted fully \$500 million between programs and ministries. Such a large redistribution has obvious policy-oriented implications for those programs affected by it.

Despite or perhaps because of its importance, the process of expenditure control is secretive. Variance reports are the exclusive property of Treasury and Management Board. They are never published and are not distributed within government. Ministries are aware only of their own financial profile. Re-allocations and embargoes occur at the discretion of Management Board and Cabinet. A very high level of secrecy thus surrounds the process by which the budget is formulated and implemented. In chapter VI, we will return to the subject of budget secrecy and note briefly the existence of pressures, both in Canada and elsewhere, favouring a more open budgeting process.

E. Opportunities for Public Participation

In previous chapters, passing references were made to the opportunities that may exist for public participation in the policy and decision-making processes of the Ontario government. At this point, it may be useful to highlight those opportunities briefly by describing some of the more important mechanisms or channels for participation afforded the public.¹⁵³

If we follow the framework developed earlier and start at the ministry level, where a great deal of policy initiation takes place, we discover that opportunities for public participation are within a minister's discretion. He or his senior officials decide the nature and degree of citizen participation in policy-making. He selects the issues and the appropriate mechanisms or channels for public participation. Thus, sometimes he may only ask for briefs or submissions from interested groups or citizens; or he may create ad hoc advisory committees composed of individuals having some direct interest in the policy issue, or possessing some special expertise. At other times, special seminars or conferences may be organized around a topic under consideration by the ministry. Who is invited to participate and what information ministry officials exchange with participants is largely at the

153 For a review of the possibilities for public involvement in the deliberations of local government bodies, see S. Makuch and J. Jackson, Freedom of Information and Local Government in Ontario (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 7, 1979).

discretion of the minister and his senior officials. More often than not, such discretion is exercised to the advantage of the government officials involved in such discussions. Quite apart from formal interchanges of this kind, a great deal of interaction also occurs on an informal basis. For the most part, however, both formal and informal interactions are carried on among a few select individuals or groups, with the general public often not aware of their occurrence.

Far more open to public participation are commissions of inquiry, created to investigate controversial issues or topics. Such commissions usually hold public hearings and invite the submission of briefs from the public. It is interesting to note the recent initiatives taken by the Royal Commission on Electric Power Planning (the Porter Commission) to encourage public participation by providing funds to public interest groups to assist in the preparation of background studies. Increasingly, however, such commissions rely less on public hearings as the basis for developing recommendations and more on hiring specialized research staff to conduct studies and objective analysis. Because of this professional staff input, it may be that the influence of the general public on the work of these commissions has diminished.

Moving toward the Cabinet level, provincial secretaries and their secretariats provide several channels to public participation. Some have created advisory councils mandated to advise the provincial secretary on issues of special concern, as has, for example, the

Provincial Secretariat for Social Development with respect to multiculturalism, the physically handicapped, senior citizens, the status of women, and youth. While the public does not directly participate in the work of these councils, it does have the opportunity to make representations and submit briefs for the councils' consideration. While many such advisory councils function independently insofar as they identify issues for study and prepare reports for publication, it is the minister who alone possesses the policy-making powers. Provincial secretaries, moreover, in their capacity as chairmen of the policy field committees of Cabinet, have on occasion taken their committees to local centres and invited the public to participate in discussions on issues of concern before the committee. Such meetings, however, occur only on an ad hoc basis.

At Cabinet itself, several advisory committees have been created, such as the one on Confederation, comprising individuals with varying backgrounds and occupations. Moreover, Cabinet itself has sought to involve the public in its deliberations by holding open sittings in various centres throughout the province. The use of White and Green Papers constitutes another mechanism for involving citizens in policy-making, by providing the public with information on the government's analysis and objectives with respect to a particular policy concern. Green Papers can be particularly useful in initiating wide public debate, since they offer a set of policy alternatives and background information without specific recommendations endorsed by government.

The public is therefore free to discuss the range of alternatives. This is in contrast to White Papers, which provide policy recommendations to which the government is already committed. As indicated previously, the COGP recommended the increased use of Green Papers to stimulate greater public participation in the policy process.

At various stages in the policy process, from the ministry to the Cabinet level, public opinion surveys are used by government policy-makers to assess the attitudes and views of the public with respect to a particular issue of concern. While the use of such surveys can be characterized as a passive form of public participation, it is nonetheless a device for obtaining public opinion on matters of interest to the government.

At the legislative level, citizens may have the opportunity to participate in the work of the standing committees of the House during the review process for proposed legislation. Individuals or groups may be invited to offer critical assessment of the proposed legislation. Individuals and groups may also come forward on their own initiative. The committees, however, have a limited capacity to effect substantial changes in a proposed piece of legislation, given that the government's introduction of such legislation in the first instance indicates a firm commitment. Occasionally, select committees of the legislature are established to study and report on a matter of public interest. Public participation before such committees may have an influence on the content of the reports produced by them.

Apart from the foregoing mechanisms, it must be noted that the government has established a number of governmental agencies with an explicit mandate to hold public hearings as part of that agency's decision-making process. As illustrations, we may cite the Ontario Energy Board and the Environmental Assessment Board, whose activities are reviewed in another study prepared for the Commission.¹⁵⁴ In this context it is of some interest to note that the Royal Commission on Electric Power Planning (Porter Commission) has actively explored the role of public participation under its mandate to examine the long-range electric power planning concepts of Ontario Hydro.¹⁵⁵ As a result of its hearings on the subject, the Commission has published a paper that deals extensively with this issue.¹⁵⁶ The provincial government has, for example, through the Porter Commission, funded local groups so that they can employ independent consultants for community impact studies, as has the Ontario Hydro itself.¹⁵⁷ These and other developments in this area have been experimental thus far, and as a report of Ontario Hydro argues, it may be that "There are no set rules for public involvement programs in project planning. They need to be custom designed."¹⁵⁸

154 See Fox, op.cit.

155 Royal Commission on Electric Power Planning, The Decision-Making Framework and Public Participation, Issue Paper No. 8 (May, 1977) 1.

156 Ibid.

157 Ibid., 31.

158 Ontario Hydro, Public Participation, Memorandum to the Royal Commission on Electric Power Planning with Respect to the Public Information Hearings (March, 1976) 17.

In addition to these formal mechanisms, of course, interested individuals and groups can and do contact ministry officials and elected representatives in order to make representations on matters of concern to them.

In sum, although the rich variety of mechanisms for public participation may suggest a lack of overall policy on matters of structure, it is nonetheless clear that the government of Ontario places a high value on public participation and has encouraged its development in a number of ways.

CHAPTER V

AN EXAMINATION OF POLICY DOCUMENTS: FIVE CASE STUDIES

In the preceding chapters, the policy structures, the actors and the policy process in the Ontario government has been described in some detail. In this chapter, an account is given of material examined in the course of five case studies of particular instances of policy-making undertaken during the course of this study.¹⁵⁹ The treatment currently given the documents in question in terms of its availability to the public will be noted.¹⁶⁰ In choosing the examples, an attempt was made to select cases that are representative of the variety of policy-making activity throughout the government. Accordingly, the studies include processes ranging from one characterized by a high degree of public involvement, to one completed without any recourse whatsoever either to the interested or affected public or to outside advice of any kind.

159 The cases selected relate to policy decisions taken in the past. This was done in order to avoid interfering with any on-going policy process.

160 The documents were reviewed with civil servants in middle-management positions and working principally in their respective ministries' policy planning branches. The comments that appear in the following pages are generally theirs, though in some instances more senior officials were consulted as to existing policies with respect to public access.

A. Development of Bronte Creek
Provincial Park

In 1971 the then Department of Lands and Forests undertook an examination of the possibility of creating a provincial park based on land owned by the Halton Conservation Authority in the area of Bronte Creek. The policy process in this case involved several departments of the provincial government, as well as individuals and organizations outside the government. The principal responsibility for arriving at a decision lay with the Ontario Parks Integration Board, which was a committee of Cabinet established to oversee the policies and programs of all parks under provincial jurisdiction. While the entire Cabinet maintained the authority to review and alter any of the recommendations of the OPIB, that committee was effectively the ultimate decision-making body regarding this project. The files show that, as the proposal took more substantial shape, the Board gave approval or instructions for further stages of development of the concept. It was the OPIB that authorized the instructions to the Department of Public Works to start land acquisition proceedings, and cleared budget matters through the then Treasury Board.

Throughout this early stage, correspondence and meetings with the Ministry of Transportation and Communications were necessary to clear up matters of access to the new facility and to coordinate the transportation plans of that ministry with those of the project. Similar liaison was necessary with the local municipalities, with the

Conservation Authority, and with other agencies of the provincial government, such as the Ministry of the Environment.

As public knowledge of the proposal became more widespread there were submissions of interest from individuals, many of whom wanted to know the effect of the proposal on land they owned in the vicinity. In addition, other individuals wrote to offer their professional services in the development of plans.

Once planning had advanced to the point where a public announcement was appropriate, the Premier made a statement. It was also announced that an Advisory Committee would be created to hear public submissions on the design and uses of the park, and to recommend on these matters to the Ministry. The Advisory Committee was appointed by Order-in-Council and carried out its tasks as assigned.

When the report of the Advisory Committee had been reviewed and a general policy statement about the park developed from the master plan, the actual physical development of the park began -- a process that can, for the purposes of this study, be considered to be program delivery rather than policy development.

Much of the material on this matter is composed of correspondence. There are letters and memos to and from the Minister on such subjects as the following:

- . asking a division of the department to investigate the original proposal;
- . answering queries by other ministers on the status of the Bronte Creek proposal;
- . sending a copy of a proposed news release to the Premier's Office;
- . with other ministers and local officials regarding meetings to discuss such matters as roads and other improvements;
- . with a film company who had suggested making a documentary film of the development of Bronte Creek;
- . with private citizens or their lawyers and with local officials on the status of the proposal and of land in the vicinity;
- . with another ministry who had been approached with a query about the development of government camp-sites in the park;
- . with Halton Conservation Authority regarding transfer of land to the Crown, and the compensation therefor;
- . outlining the terms of reference of the Advisory Committee;
- . from the local school board offering to sit on the Advisory Committee;
- . from another minister regarding membership on the Advisory Committee;
- . application to the Lieutenant Governor in Council for the appointment of the Advisory Committee, and copy of the resulting Order-in-Council;
- . with people nominated for the Advisory Committee concerning their appointments and the first meeting;
- . requesting a speech be prepared;
- . with architectural and engineering firms asking to be considered for consulting services in regard to the park development;
- . concerning the name of the proposed park;

- regarding the need for access by handicapped people to the proposed park;
- acknowledging receipt of submissions and forwarding them to the Advisory Committee;
- regarding a request to develop a private campground in the park;
- inviting attendance and participation at public hearings on the recommendations of the Advisory Committee;
- concerning zoning in the vicinity of the park;
- regarding a meeting with other ministers to settle some policy and coordination problems among their ministries;
- issuing a press release about the Bronte Creek Master Plan;
- to local municipalities asking them to review the Master Plan from the point of view of local zoning requirements;
- to various ministers and the Advisory Committee announcing the appointment of a consultant;
- granting life memberships to the park for members of the Advisory Committee;
- press releases announcing contract awards.

The file also contains material going to and from the Ontario Parks Integration Board, the responsible Cabinet committee. This material includes:

- notes re telephone calls about meetings and submissions;
- minutes of meetings giving instructions for further work to proceed;
- letter instructing an official to serve as coordinator for the project;
- report to the Board concerning the proposal;
- letters notifying officials of approval of land acquisition and calling for estimates of costs;

- . letter to an official in the Department of Public Works asking him to take options on the property needed for the park;
- . letter to officials to proceed with preliminary planning for development of the park and to ask for funds for the purchase of property;
- . letter to officials saying that Treasury Board has approved funds, and including a report on the proposed use and development of the park together with a projection of costs over the next five years;
- . letter authorizing consideration of a link to the GO transportation system and requesting a report;
- . letter referring back suggestion for a name change and asking the matter be considered by the Geographical Names Board.

Another class of document in the files is correspondence by officials with other branches of the provincial government. Among these are the following:

- . application to Treasury Board for funds, and formal authorization for commitment from Treasury Board (this authorization covered other programs besides Bronte Creek Park);
- . letters to Public Works re land acquisitions;
- . correspondence with other ministries regarding the effect the proposed park would have on their plans and programs and notes of meetings in this regard;
- . application to Treasury Board in regard to the Advisory Committee.

Documents internal to Lands and Forests in the file include the following:

- . memo from the District Forester with sketch of land ownership in the proposed park area;
- . memo requesting an aerial photo of the proposed park;

- . memos regarding personnel requirements, levels, etc.;
- . early drafts of a statement eventually made by the Premier;
- . copies of deeds to some of the properties involved;
- . terms of reference and outline of duties of Bronte Creek Conservation sub-committee;
- . memo regarding a water control project in the area;
- . report on long-range plans re transportation;
- . memo expressing objections to the proposed capacity standards for the park;
- . memo on comments heard by a civil servant about membership of the Advisory Committee;
- . material for a speech to be given by another minister;
- . Bronte Creek Provincial Park Background Information Report;
- . news release about the Advisory Committee recommendations and the upcoming public hearings on them;
- . Minutes of the Advisory Committee (these minutes trace the whole process of the Committee in its work of devising the original policy recommendations, holding public hearings on them, revising the recommendations in the light of public comments, hiring a consultant to prepare a Master Plan for the park in accordance with the revised policy recommendations, discussion of the draft and final Master Plan, and the forwarding of that Master Plan to the minister for approval);
- . memos re screening, selection and hiring of consultant to prepare Master Plan;
- . Bronte Creek Policy Addendum, containing amendments to the original policy recommendations, and prepared after the public hearings;
- . proceedings of public hearings, including all submissions made;
- . memo following approval of Master Plan concerning the "philosophy of interpretation" for implementation;
- . memos regarding a tenant on newly acquired land;

- . letter respecting fees policy for Bronte and list of names to be contacted to determine community needs.

The foregoing is not an entirely exhaustive list of the material in the file, but it should serve to give an indication of the nature and variety of material involved. Later material pertains to the implementation of the Master Plan, and falls outside the terms of reference of this study.

As was found to be the case generally, there is no overriding policy to guide civil servants in responding to requests from the public to see material in these files. Certain material is regarded as confidential. Minutes and instructions from the Ontario Parks Integration Board, for example, would not be released for public scrutiny on the ground that they pertain to a Cabinet committee, and traditionally Cabinet material is considered confidential. Similar treatment would be accorded documents going to and from Treasury Board, and for the same reason. Much of the ministerial correspondence is considered by the civil servants interviewed as privileged, and therefore not subject to public disclosure. In this regard, any requests would probably be referred to the minister's office.

All matters dealing with personnel are considered to be confidential, including documents that deal with requests for complement and the like without containing any personal information about individuals or

individual positions. There appears to be a general feeling that personnel matters are by definition confidential.

The documents dealing with the actual geographic area to be affected by the proposal would not have been released by staff until the final decisions about park boundaries were determined, and until the process of land acquisitions had proceeded to a point where public knowledge would not jeopardize the program or result in land speculation. Once the actual boundaries of the park were announced, the sensitivity of these internal documents would be reduced considerably.

A decision to maintain confidentiality would also greet a request to see the correspondence and related minutes, etc., generated as a result of meetings and consultations with local authorities and other provincial ministries to coordinate planning and programs. The concern here, in part, is with releasing material that involves people from other organizations who might have reasons of their own for not wanting the particular items to come to public notice. Letters dealing with legal problems that arose in connection with the purchase of property would also be treated as confidential.

Neither the memoranda which contain objections made by officials to proposed capacity standards for the park, nor the one that relates to comments of an official with respect to the membership of the Advisory committee, would be released. Traditionally, subjective views and

opinions are considered confidential in order to protect the anonymity of civil servants. If such views were released, it is argued, both the civil servant and his minister may be embarrassed and this could lead to curtailment of the expression of such frank views on paper.

At the other end of the scale, certain material would be released without hesitation. The minutes of the Advisory Committee and the public hearings, for example, are publicly available in the district office of the Ministry of Natural Resources. Similarly, the technical reports generated within the ministry would be available to anyone who asked to see them. (Requests for these currently come mainly from students, consultants and local officials.) Parks policy manuals are also available in parks offices for public scrutiny.

Much of the material, however, is subject to no clear policy to guide staff in responding to requests. Requests for this material would be judged on an individual basis, with the decision being based on an assessment of the reason for the request, the use to which the information gained might be put, and an ad hoc assessment of the sensitivity of the material. Undoubtedly, requests for some of the material would be referred to higher authority in the ministry, since the officials interviewed were conscious of a need to avoid exceeding their authority in these matters.

Due to the lack of any clear guidelines and general uncertainty with respect to public access, much of the material is being kept confidential. Decisions tend to be made on the basis of precedent where such exists, though again uncertainty appears to be pervasive. Such uncertainty, in light of the fact that requests for information about parks development occur on an almost daily basis, leads to the consumption of considerable time in making decisions in each individual case.

B. Amending the Crown Timber Act

In 1974, an Interministerial Timber Revenue Task Force was created to make recommendations on timber revenues received by the government. This process culminated in the passing of The Crown Timber Amendment Act in 1978. Serving on the task force were representatives of the Ministries of Natural Resources, Revenue, and Treasury, Economics and Intergovernmental Affairs. A representative of the last served as chairman. The files of the Ministry of Natural Resources regarding this exercise were examined. Due to time constraints, however, an examination of the files in the other two ministries involved was not possible.

The task force was established without representation from the lumber industry, although a request for such participation was received by the government. After detailed study, including the running of computer

models of alternative proposals, the task force made recommendations which were embodied in its report to the ministers of Natural Resources and Treasury, Economics and Intergovernmental Affairs, dated October 1975. After tabling in the House and general public release, the report was sent to companies and associations in the industry, along with a request for comments. The task force was reconstituted (it had been disbanded with the completion of its report) to assess the submissions that came from industry and to devise alternative options for a policy. Several options were worked out and presented to the ministers for consideration, agreement being finally reached on one. Once this was accomplished, the task of drawing up the amending legislation fell to officials in the Ministry of Natural Resources, whose minister eventually introduced a bill in the House. The bill, entitled An Act to Amend the Crown Timber Act, was passed in June, 1978.

The files in the Ministry of Natural Resources on this subject have not yet been culled and certain duplications exist -- there are three copies of much of the material, which were each used by one of the three main ministry people involved in the process. A description of the documents found in the files follows.

The files pertaining to the original task force effort contain correspondence of considerable variety:

- . to and from the minister and officials with representatives of the industry on such subjects as membership of the task force, meetings of representatives with the task force, an industry brief and a meeting to discuss it;

- . internal memos on such subjects as: terms of reference and work outline of the task force; and outline of the computer model to be used to simulate results from various alternatives; a request for a narrowing of the terms of reference; individual official's comments on interim proposals, referring to a Cabinet decision on a related subject, discussing the work of the task force, requesting information or commenting on the work and approach of the task force;
- . letters to Statistics Canada concerning information required by the task force and the confidential treatment thereof, as well as memos of conversations on the subject;
- . letters from the deputy minister to his counterparts in other provinces forwarding copies of the draft report and inviting comments, together with the replies received;
- . memos to file on certain technical matters related to the work of the task force.

The files also contain a number of lists, reports and other working documents, such as:

- . mill licence returns supplied on request by regional foresters;
- . list of independent logging companies;
- . memo including suggestions for the updating of the price index;
- . list of sample sawmills for study together with a note of the information that is needed on each;
- . list setting out ownership, products and capacities of pulp and paper mills in Ontario;
- . list of landholdings of companies having crown timber licences;
- . list of pulpwood used, by species;
- . agendas and minutes of task force meetings;
- . various drafts of a paper on the impact of the forest industry on the Ontario economy;

- . list of information on companies to be obtained by Revenue (the information, which is treated by Revenue as confidential, is not included in the file);
- . reports of working groups;
- . rejoinders to comments received on draft reports and reports of working groups;
- . computer printouts relating to existing and possible alternative systems;
- . chart and tables of government costs of providing services to the forest industry;
- . task force progress report;
- . notes on meetings with private sector representatives, both formal and informal.

There is also a newspaper clipping file on this and related subjects.

The report of the task force is the final document in this phase of the file.

The task force was reconstituted almost as soon as it had completed its report. New material appearing in the file from this phase of the policy development process includes the following:

- . letters and memoranda regarding the release of the report;
- . copy of the news release;
- . copy of statement by the Minister of Natural Resources to House outlining the study procedure and its results, and asking for public reaction;
- . correspondence between the Minister of Natural Resources and the Treasurer;
- . comments of regional foresters on the task force report;

- . submissions from the industry regarding the report, many with handwritten annotations by staff;
- . miscellaneous correspondence;
- . minutes of the reconstituted task force;
- . report to the ministers giving industry comments on original recommendations and suggesting alternative revenue goals.

Following the production of this second report the task force was dissolved, and the decision-making process was carried forward by the Minister of Natural Resources and the Treasurer, together with their staffs. The file covering this phase includes:

- . memoranda internal to the ministry;
- . correspondence between ministry officials and their counterparts in the Ministry of Treasury, Economics and Intergovernmental Affairs;
- . notes of telephone conversations;
- . correspondence between the two Ministers culminating in an agreement on the choice of one of the options.

Once agreement was reached, instructions were given to ministry officials to draft appropriate legislation. This portion of the file contains:

- . memoranda internal to the ministry concerning the various drafts of the proposed legislation;
- . drafts of the proposed legislation, often with marginal comments;
- . correspondence with the Treasurer;
- . memoranda and related material pertaining to an order-in-council that was passed to overcome a technical difficulty that had arisen;
- . copy of the order-in-council.

Much of this material is marked confidential -- particularly the drafts of the legislation sent from the ministry's legal branch for comment or approval.

Ministry officials indicated that requests for access to the files from the public would be treated as responsively as possible. Some material, such as that specifically marked confidential, would not be shown and some of the background material, which is summarized in the report, would also not be shown, though any summaries would be.

Because of an absence of an overall access policy, each request is dealt with on its own merits. A student seeking access for an assignment, for example, would probably gain greater access to the file than would someone with a different purpose. Students allowed access would be briefed, nevertheless, on confidentiality and on what may, and may not, be reproduced. In any event, the file would be culled before any access was allowed to a member of the public.

There appears to be a general concern that material received from private sources outside government should be kept confidential. Two reasons were advanced for this position: first, that there is an implicit, sometimes explicit, understanding with the information source that the government will not disclose the information and it is felt that such understanding ought not to be breached. Secondly, if such information were disclosed, information from private sources would not be forthcoming in the future.

Another reservation expressed about disclosure of policy documents centres on the possibility that civil servants would cease to be frank in expressing their views and assessments of policy options. One official expressed the opinion that if a general policy of disclosure were to be adopted, views on controversial subjects would probably be provided by verbal rather than written communication.

C. Amendment of the Niagara Parks Act

The two cases of policy development cited above involved some public participation. The revision of The Niagara Parks Act did not. The process began when the Niagara Parks Commission (a body appointed by the Ontario government that reports through the Minister of Natural Resources) recommended to the Minister that the Act under which they operate be revised to allow a larger maximum fine to be imposed for violations. During the process of consideration, issues were raised about who should be the recipient of the fines revenue, and whether the maximum fine should be set by legislation or by regulation. The process involved consultations with the Ministry of the Attorney General, the Legislative Counsel, the Commission and the Cabinet Committee on Resources Development. The result of the process was the passage of legislation amending the Act.

The material examined concerning this policy is found in the files of the Ministry of Natural Resources and in those of the Cabinet Committee on Resources Development. Neither file is extensive. It is clear that other material, or at least duplicates of what was found in the two files, will exist in other places, such as the Minister's own office files.

The files of the Cabinet committee contained such material as the following:

- correspondence from the solicitor of the Niagara Parks Commission asking for the legislative amendment;
- correspondence between the Minister of Natural Resources and the Attorney General;
- copies of internal memoranda of the Ministry of Natural Resources on the subject, including instructions sent to the Legal Services Branch of the Ministry;
- correspondence from the Commission to the Ministry on one concern about the proposed amendment;
- various drafts of the background and proposed amendments for the Cabinet submission;
- memo to the Minister indicating that the bill is ready for introduction to the House.

The other file examined is in the offices of the Policy Coordination Secretariat of the Ministry of Natural Resources. This file consists of the following:

- duplicates of some, but not all, correspondence originating in the Ministry;
- letter from the Ministry Legal Department commenting on one aspect of the proposed amendment;

- . other internal memoranda commenting and reporting on the provisions and progress of the drafting of the amendments;
- . correspondence with the Legislative Counsel;
- . correspondence with the Niagara Parks Commission;
- . copy of the draft bill, The Niagara Parks Amendment Act, 1978.

Both files are considered by their custodians to be confidential. In the case of the Cabinet committee staff, the reason advanced for this policy is that all Cabinet documents are considered confidential.

Apparently, there would be little reluctance to reply to a request to know the substance of the file's content, but the actual material would not be released. Officials believed there is little substantive reason to keep this material from the public domain, apart from the general policy applied to Cabinet material.

The Ministry of Natural Resources file was also considered confidential, primarily because it concerned a policy issue that resulted in a Cabinet submission. Officials interviewed indicated a concern that public access should not be granted to such files during the period in which the decision-making process was underway. Public access from the outset of policy formulation, it is thought, could greatly hamper the policy development process and create undue and unnecessary delays. Informing the public need not wait until the government position has been finally determined, but "in any decision-making process there is a strategic time to inform the public."

The material in this file is considered confidential, and is not available to the public. Certain documents, of course, are already in the public domain, such as the press releases, the statement to the House, the bill, and the terms of the federal-provincial agreement. Any material that originated outside the Ministry would not be released without permission of the document's originator.

The general rule regarding this material is that it is policy material and therefore confidential. Early drafts of the legislation or the federal-provincial agreement would not be shown, since a reader could use it to trace changes in policy on the part of the government. Underlying this general attitude may be the perception held by members of the legal profession, that the dealings of lawyers are subject to the confidential treatment of the lawyer-client relationship.

We were told, however, that if another jurisdiction asked for material from the file, it would be passed on in confidence. Further, legal advisors who are not strictly employees of the ministry would also be shown whatever they needed from the file for their work.

D. Creation of a Unified Family Court

In 1974 the Ontario government entered into discussions with the federal government to examine the possibility of creating a unified

family court system that would deal with all issues with respect to family law that would otherwise have to be dealt with in separate court systems. After a period of study, discussion and negotiation, a decision was taken in 1976 to establish as a pilot project, a combined court with both federal and provincial jurisdiction in Hamilton-Wentworth.

The files concerning this matter are in the custody of the Ministry of the Attorney General. The following types of material were found in those files:

- . correspondence between the Ontario Attorney General and the federal Minister of Justice on a variety of subjects, such as the constitutional issue of dual or single appointment of judges to the proposed court; the breadth of jurisdiction of the court; the financial arrangements; the details of legislation required to establish the court pilot project and to overcome certain difficulties of a specific nature, and concerning the current status of the project;
- . correspondence with people outside the Ministry such as judges, law professors, legal practitioners on various policy and technical matters relating to the proposal for a Unified Family Court. Many of these documents contain the frank opinions of the people consulted on a personal basis;
- . internal ministerial memoranda covering the development of the proposal from both a policy and administrative point of view, and containing a range of opinion about the various aspects of the proposal;
- . notes of telephone conversations of ministry staff with federal officials, court officials, journalists and the like;
- . copies of reports on the proposal during the whole period of its development from idea to actuality;

- . submissions to Management Board and to Cabinet on the proposal;
- . draft and final Order-in-Council, and notification of Cabinet approval of that document;
- . statistical reports of types of cases heard;
- . memoranda of agreement between the federal and provincial governments;
- . copies of relevant legislation of other jurisdictions;
- . minutes of meetings;
- . copy of statement to the House;
- . copies of reports of various cases;
- . copies of drafts and final bill;
- . Cabinet submission;
- . newspaper clipping file.

E. Amendment to Age of Majority

In 1969, the Ontario Law Reform Commission, a research and advisory body reporting to the Attorney General, undertook a study of the age of majority in respect to the following matters: the age at which people may enter into contracts, the age at which they may hold and dispose of property, and the optimum age for the termination of maintenance allowances. Other matters relating to the age of majority, such as driving and drinking age, were not considered in the study.

The Age of Majority Project of the Commission asked for submissions from a variety of groups and individuals, collected material from sources in Ontario and elsewhere, and prepared its report. Once the report was approved by the Commission it was forwarded to the Attorney General, who ordered the preparation of a bill and presented it to the House. The files show that once the Act was passed, attention was directed to the details of implementation and the implications of the new legislation.

The pertinent material is found in the files of the Ontario Law Reform Commission, of the Ministry of the Attorney General, and of the Legislative Counsel.

The Law Reform Commission files contain such data as the following:

- . relevant material from other jurisdictions, some of it sent in confidence as it was not at the time of sending in the public domain, and related correspondence;
- . mailing list, form letter and replies to request to members of the legal profession, judiciary and public for submissions on the subject;
- . bound collections of the submissions received, and list of replies that did not contain formal submissions;
- . copies of bills and related data;
- . correspondence with outside advisors;
- . internal notes and memoranda;
- . list of policy decisions needed;
- . draft of report;
- . comments on draft by Commissioners and staff;

- . report of project approved by Commission;
- . correspondence in connection with release and distribution of the report;
- . press clippings;
- . correspondence between Commissioners on the project and the way the Commission should handle it;
- . relevant statistical material;
- . miscellaneous correspondence with members of the public and government officials;
- . copy of speech by the Prime Minister of the day.

The Law Reform Commission holds two files relating to this matter. The first is the general Commission file; the second is the Chairman's file. The material in the general file is not considered to be confidential by the staff to whom we spoke. Although public access is not actively encouraged because of time and administrative implications, it would be granted if requested. The only exception is data supplied in confidence, in which case the inquirer would be referred to the original source.

Access to the Chairman's file would not be treated the same way, since the file is considered by staff to be his personal property. There is a great deal of duplication between the two files, however, and nearly all the material likely to be requested could be found in the general file. Authority for release of data from the file would have to be given by the Chairman or Vice-Chairman. It should be noted that some members of the Commission maintain files outside the Commission offices,

and these files are considered by staff to be the personal files of the Commissioners concerned.

Material on the Age of Majority is found in the files, now in long-term storage, of several officials of the Ministry of the Attorney General. Included in these files are items such as the following:

- . requests for information from other provinces and the replies;
- . internal correspondence regarding the Act, some problems envisioned in connection with it, and the timing of proclamation of its provisions;
- . correspondence regarding dissemination of information about the new Act and its implications;
- . notifications to various officials and court officers about the Act, including a memo from the Chief Judge to all judges;
- . correspondence with other government ministries;
- . correspondence with outside bodies and individuals about provisions and wording of the Act;
- . notes about meetings held on the proposed Act;
- . drafts of the Act and copy of final bill;
- . copies of proclamations of the Act;
- . opinions about interpretations of various sections of the Act;
- . press clippings.

The files are silent on the deliberations that went on between the time the report of the Ontario Law Reform Commission was received and the time the bill was presented to the House.

The information in the files is not considered confidential, as is evident from an examination of the replies for information that appear in the files themselves. Clearly, an attempt is made to give full and factual answers to queries.

We were told that material received from outside sources would not be released unless permission was received from those people supplying the material. Some of these documents contain very frank comments. Personal information concerning the provider of the information is sometimes included. Officials indicated that requests for this type of information would be unusual.

Access would not be granted to draft legislation of other jurisdictions; queries would be referred to the appropriate authority in that jurisdiction.

Sometimes legal opinions prepared by members of the ministry staff are available, but most frequently not. If an opinion had been prepared for another ministry, that client ministry's approval would have to be obtained before release would be granted.

Ministry officials interviewed indicated that a major problem, if public access were to be granted, would be the need to classify all the material in the file to separate out that which was confidential. This procedure would necessarily be time-consuming. On the whole,

ministry officials would prefer to answer queries individually, providing whatever information is relevant and available, rather than give open access to the actual files.

The file in the Legislative Counsel's Office contains the following:

- . first draft of the new bill and schedule;
- . handwritten amendments to the first draft;
- . copy of the amendment to the Alberta legislation;
- . letters to Lieutenant Governor in Council regarding proclamation of sections of the Act;
- . private and confidential letter from the minister announcing approval of the bill;
- . copy of a motion by an MPP to strike out two sections of the bill;
- . correspondence with a minister regarding a problem that the proposed wording would create, and a memo to the Attorney General in response;
- . copies of the new bill.

All the material in the files of the Legislative Counsel is considered confidential, on the basis that Legislative Counsel considers this information to be subject to solicitor-client privilege. It should be noted that the files of this office are not themselves a complete record of the work undertaken, since many of the discussions about drafting problems and amendments are oral, and reflected in writing only in subsequent drafts of the legislation in question.

F. Conclusions

Some general conclusions can be drawn from the preceding review of documents and information generated by specific instances of policy-making.

- 1) There appears to be no overall and consistent access policy with respect to the previously described documents. There are ad hoc practices and procedures that vary from one ministry to the next, and from one request for access to another. This situation appears to be a source of some frustration and confusion on the part of the government officials who decide access questions.
- 2) While public access to the above policy documents is permitted in some measure, Ontario civil servants approach the issue of public access with considerable caution and with many reservations.¹⁶¹ No doubt, this phenomenon is, in large measure, attributable to the lack of an explicit government-wide policy, to the time-honoured tradition of administrative secrecy, and to attitudes indicated by the Oath of Secrecy that Ontario civil servants must swear.

161 A similar attitude was evinced by the American public service when in 1977, the federal Freedom of Information Act was passed. After more than a decade of implementation, during which time (1974) the Act was amended, there is evidence to indicate that this cautiousness on the part of the American public service is less evident, and that there is broad acceptance of the principles underlying the Act. See Harold C. Relyea, "The Freedom of Information Act a Decade Later," Public Administration Review, 39, no. 4 (July/August, 1979) 3.

CHAPTER VI

THE DISCLOSURE OF POLICY-MAKING MATERIALS: ISSUES AND ANALYSIS

In a discussion of whether and how to open the policy-making process in the Ontario government to greater public access, a variety of factors, arguments and concerns need to be identified, articulated and weighed in the balance. This chapter will proceed on the following plan. It will begin with a review of those general arguments and broad considerations favouring the right of all Ontario citizens to have access to all government-held information. The topics to be discussed include accountability, public participation and preferential access. Next, we will consider certain parliamentary traditions and administrative practices that may inhibit the complete disclosure of certain government information, thereby limiting the scope of public access. Our attention will focus on the constitutional traditions of individual ministerial responsibility, Cabinet secrecy, public service neutrality and anonymity, and on the "frank advice" problem, i.e., the concern that openness in policy deliberations will inhibit candour. While an examination of these issues may lead to limitations on public access, one additional consideration will be raised which may be useful in defining more closely the scope of such limitations; the possibility of drawing a distinction between facts and opinions, and providing that only the latter are exempt from access.

In addition to these general considerations relating to the scope of public access, attention will be addressed to specific categories of information and types of documents which present identifiable problems for a public access scheme. Certain government-held or generated information -- financial, budgetary, relating to intergovernmental relations, and legal advice -- may be of such a nature that an identifiable harm could result from its disclosure. Finally, consideration will be given to certain types of documents -- private submissions or briefs, public opinion polls, and consultants' reports -- whose confidentiality, even though hitherto assumed by government to be necessary, appears to be contrary to the public interest.

A. Accountability

To say that those who wield political power must be accountable to the governed, is merely to reiterate a fundamental maxim of democratic government. The relationship between the governors and the governed in a democratic society is such that those who wield power must act in such a way as to gain the approval of at least the majority of the voting populace. The latter have the right to dismiss the governors on an assessment of their performance. Ongoing public debate and assessment constitutes an essential element in this relationship. It serves to provide the governors with the opportunity to ascertain the views and opinions of the governed. The latter, through this mutual dialogue, can gain some measure of a government's performance. These

democratic fundamentals suggest that the adoption of mechanisms that enlarge the opportunities for informed debate ought to be encouraged.

In the Canadian context, such encouragement -- through the implementation of a statutory right of public access to government information -- may be particularly desirable. Styled on the British model, our parliamentary system has been characterized as being relatively closed in comparison, for instance, with the American congressional system.¹⁶² Underpinning our "closed" system are the traditions of political and administrative secrecy, the monopolization of much socially valuable information in the civil service, and the relative weakness of the legislature as compared to the Cabinet in policy formulation. These characteristics of our political system tend to inhibit informed dialogue between the governors and the governed by keeping the latter at arm's length from the sources of public power. As Professor Hodgetts has argued, there are some clear dangers in such an arrangement.

In a system such as ours, where policy initiatives are either germinated by experts in the bureaucracy or ratified in secrecy of Cabinet enclaves or compromises worked out behind the closed doors of ad hoc dominion-provincial entities of all descriptions, there is great danger that public apathy will be assumed as a fact of life. 163

162 Presthus, "Aspects of Political Culture and Legislative Behaviour," op.cit., 11.

163 Hodgetts, "Public Power and Ivory Power," 280.

Accountability for the exercise of political power cannot be exacted where knowledge and information is unequally distributed between the governors and the governed. Should attempts be made to redress this imbalance? In some ultimate or absolute sense, it may be impossible to effect an equality of knowledge and expertise between the government and the citizenry. Yet, partial solutions, conducive to a greater measure of accountability, may perform a useful function. In the opinion of Professor Hodgetts, "Counter-measures must be deliberately designed and promoted to the end that governments will not be viewed, or view themselves, as the ultimate repositories of all knowledge."¹⁶⁴

In the words of the federal Green Paper on public access:

Democratic government must be government acceptable to the collectivity of citizens. To ensure that it is acceptable, there must be a political system to establish that government is accountable. Effective accountability -- the public's judgment of the choices taken by government -- depends on knowing the information and options available to the decision-makers. Assessment of government depends upon a full understanding of the context within which decisions are made. 165

The value placed by a democratic society on the accountability of its government thus offers a strong rationale for greater access to the information underlying the process of public policy formulations.

164 Ibid.

165 The Hon. John Roberts, Legislation on Public Access to Government Documents (July, 1977), Supply and Services Canada (June, 1977) 1.

B. Public Participation

Claims premised on the value of greater public participation in policy-making are often coupled with arguments for freedom of information legislation. Greater public access to policy documents, it is contended, would contribute to an increase in public knowledge of contemporary issues, and would create conditions in which a more thorough and critical debate could take place on these issues. Moreover, it is argued that more openness in government would do much to lessen citizens' suspicions about government programs and policies. Conditions of secrecy encourage widespread distrust in government institutions.

If public access was legislated, opportunities for greater public participation could be achieved in several ways. To the extent that opposition party members used such legislation, they would be better equipped to contribute effectively to policy debates. MPPs, aided by their research staffs, could subject existing and proposed government programs and policies to more thorough evaluations and critiques. Ontario opposition parties have expressed the view that existing mechanisms for access to government information, as set out in Standing Orders, are inadequate to meet what they believe are their responsibilities in assessing government policies.¹⁶⁶ As was

166 See submissions made to Commission on Freedom of Information and Individual Privacy by Michael Cassidy, MPP (October 11, 1977); Donald C. MacDonald, MPP and Patrick Lawlor, MPP (February 28, 1978); and Sean Conway, MPP (October 19, 1978).

suggested in previous chapters, the government enjoys a near monopoly on socially valuable information. A statutory right of access would help redress the imbalance between the government and the legislature, and more likely than not, the general public would benefit from any ensuing competitive struggle to develop alternative policy options.

The media, at least those elements involved in investigative reporting and analysis of government, would benefit by either direct use of a legislative access scheme or through coverage of the Assembly debates. The public would thus be served by the dissemination of information relevant to local and provincial issues on the public agenda.

Information on specific policy issues would also be disseminated by interest groups who accessed documents touching on the concerns of their memberships. To the extent that all groups had equal access to the same information, a wider range of views and perspectives would be articulated when such groups approached government policy-makers. The general public would no doubt benefit from policies and programs developed in a process incorporating a wide spectrum of values and attitudes currently existing in our pluralistic democracy.

Legislated access could also provide individuals, as well as groups, with opportunities to make more effective contributions to the work of entities created specifically to channel public concerns to policy-makers, i.e., advisory councils, task forces, royal commissions, and other special purpose advisory bodies.

Greater public participation in the policy process could be achieved by disseminating relevant information to individuals, groups and institutions outside the government. Existing mechanisms for public participation could be used more effectively to provide a forum in which the concerns and attitudes of interested citizens on specific policy issues could be expressed.

C. Preferential Access

Many knowledgeable observers of the policy process in Western democracies contend that government officials allow some individuals and groups easier access to policy-makers and government information than others.¹⁶⁷ Certainly, the present situation in Ontario is one in which ministers have wide discretion in choosing what information will be given to whom and when. It is reasonable to assume, even though difficult to document, that some individuals and groups in Ontario enjoy greater access to government information than others. Freedom of information laws join issue on this question by stipulating that any individual, regardless of his interest or political affiliation, should have a right of access to factual information possessed by government. Such a legal right would provide an opportunity to those groups not favoured by government policy-makers to receive information that could be of use in formulating and explaining

167 See Galnoor, op. cit.

their views to legislators, government officials or the public at large.

To the extent that preferential treatment on the question of access to information exists in Ontario whereby some groups and individuals are especially favoured by officials, the democratic value associated with the individual's right to petition government and press for a redress of grievances or some other form of governmental response is depreciated.¹⁶⁸

D. Ministerial Responsibility

The constitutional convention of ministerial responsibility is often cited as an obstacle to the adoption of freedom of information legislation in Westminster-style parliamentary democracies. Those expressing concern over the issue fear the possibility that such legislation would weaken, or perhaps even destroy the convention.¹⁶⁹

168 This notion was recognized by the COGP in its discussion of the Ontario government's communications policy: "Every citizen has an equal right to offer his views to government and an equal opportunity to communicate with government." Interim Report Number Seven, 12.

169 For discussions of this issue, see Kernaghan, *op. cit.*; also Maurice Wright, "Ministers and Civil Servants: Relations and Responsibilities," Parliamentary Affairs 30, no. 3 (summer, 1977); David Butler, "Ministerial Responsibility in Australia and Britain," *ibid.*, 26, no. 4 (August, 1973); D.C. Rowat, "How Much Administrative Secrecy?" Canadian Journal of Economics and Political Science, 31, no. 4 (November, 1965); and K.W. Knight, "Administrative Secrecy and Ministerial Responsibility," *ibid.*, 32, no. 1 (February, 1966).

It must be said, however, that there is no uniform agreement as to the content of this convention. Several threads must be identified and subjected to analysis.

First, with respect to the question of access to government information, the convention is said to provide the minister with an absolute discretion to decide what information will be released and to whom. Clearly, in positing a government-wide information policy which would be binding on ministers, freedom of information legislation would circumscribe a minister's discretion to refuse to disclose information. Legislated information policy would transform individual ministerial discretion into government policy to which all ministers would be subject and for which all ministers would be responsible.¹⁷⁰ The adoption by government of rules to circumscribe what had previously been areas of ministerial discretion is not, however, an unusual step for a democratic government to take. An illustration of this phenomenon may be useful. In Ontario, as in many other jurisdictions, rules of natural justice developed at common law and extended in their application by statute, require that due process be afforded by government officials, including ministers, to individuals in various circumstances. What must be determined, then, is whether the public interest is well served by the current levels of discretion enjoyed with respect to information policy.

170 For a succinct analysis of ministerial responsibility and how this convention would be affected by freedom of information legislation, see John Swift, "Ministerial Responsibility, Ministerial Control of Government Documentary Information and Freedom of Information Legislation -- Are They Related?" The Advocate, 37, part 2 (February-March, 1979).

A more contentious issue is whether there should be judicial review of a minister's decision not to disclose documents which, in the minister's opinion, would be exempt from disclosure by the statute. It has been contended that such judgments are necessarily political in nature, and are therefore best left to ministers; conversely, judges should only decide on the law. While a detailed review of the arguments in this matter cannot be entered here,¹⁷¹ it may be argued to the contrary that the effect of a freedom of information statute is to embody the appropriate public policy (in terms of a minimum level of public access) in statutory language. The effect of so doing is to eliminate the "political" content of a decision to refuse disclosure. The "political" judgment is embodied in the statute. The statute's interpretation is a matter which could therefore be confided to the courts without violation of our constitutional traditions.

A further, perhaps more central, theme of the doctrine of ministerial responsibility is that it acts as a system of accountability which makes ministers answerable to the legislature for their own public actions and those of the civil servants reporting to them. This doctrine would not, of course, be weakened or destroyed by a legislated access scheme. Ministers would still continue to be accountable for their actions and those of the public service. Indeed, freedom of information would greatly strengthen this aspect of ministerial responsibility to the extent that it would have, from time to time, the effect of revealing situations in which ministers should be called upon

171 See Kernaghan, Freedom of Information, op.cit.; Smiley, op.cit.

to account to the legislature.

In summary, it can be said that although freedom of information legislation would circumscribe a minister's discretion with respect to the release of information, it would do so in a way which would strengthen the operation of the doctrine of ministerial responsibility as a mechanism of political accountability. There are, however, two other aspects of ministerial responsibility that require consideration; namely, civil service anonymity and neutrality, and collective ministerial responsibility.

E. Frank Advice and Civil Service
Anonymity and Neutrality

The "frank advice" issue centres on the contention that civil servants would be inhibited from giving their best and most candid advice if documents recording such advice were to become publicly accessible. To ensure that such deliberative processes can continue on a confidential basis, an appropriate exemption has been included in the American Freedom of Information Act.¹⁷² In fact, most access legislation, including that of Sweden, exempts these types of documents from access. While there may be widespread agreement on the need to protect in principle the advice of civil servants from public exposure, there is less agreement as to the scope of that protection.

¹⁷² Title 5, U.S.C., s. 552(b)(5).

Related in practice, if not in logic, is the question of what protection should be accorded the constitutional convention of civil service anonymity and political neutrality. This convention posits the notion that the civil service is "politically invisible"; that is, under our parliamentary system, policy decisions are made by ministers with civil servants acting as mere administrators. It was contended earlier in this report that the line between politics and administration can no longer be sharply drawn, and that civil servants are intimately involved in policy-making. Nevertheless, a strict interpretation of the convention prevents civil servants from publicly expressing their views and opinions. Were they to do so, civil servants could be identified in the public mind with particular views, opinions and advice which may or may not reflect their ministers' or the government's policies. As a result, the anonymity of civil servants would disappear as perhaps would their claim to impartiality.

It should be pointed out, however, that the notion of public service anonymity has been eroded in recent years. Civil servants more and more are in the public gaze; they consult with interest groups, explain ministry policies in various public forums, and are questioned by committees of the legislature. As far as can be determined from interviews with Ontario civil servants, they are under no illusion that their identities and functions are hidden from the public. Who they are and what they do is common knowledge, especially to the interest group leaders with whom their minister must deal, and to the press and members of the opposition. What anonymity seems to mean to

these officials is that their individual views on specific subjects are not known, or at least are not attributed to them in public. Even though civil servants are increasingly appearing before legislative committees and public meetings to explain government policy, they are not asked to reveal their own political preferences or to disclose the advice they have given or will give to their ministers in the course of policy-making. Clearly, the adoption of a scheme of information access which could reveal such matters would mark a significant departure from this well-established tradition.

Is this tradition one which should yield to the rationales for greater public access to government information? Is there sufficient value in public service anonymity to override the improved ability of the public to scrutinize government which would result from greater access? A telling argument in favour of confidentiality, perhaps, is that disclosure of such material might lead ministers to discourage their advisors from candidly giving advice contrary to their own or to the government's predilections, and from exploring policy options which the minister might ultimately not wish to advocate. Arguably, the public interest in a thorough canvassing of alternatives by the government of the day should here take priority over the public interest in access to government information.

In view of these considerations, it may be appropriate in the Ontario context to exempt civil service advice and recommendations from access

along the lines proposed in the Australian¹⁷³ and Canadian¹⁷⁴ bills.

F. Cabinet Documents

In Westminster-style parliamentary systems, documents that reflect the workings of Cabinet have traditionally been subject to secrecy or confidentiality. This is not to say that Cabinet documents are never disclosed. Leaving aside the fact that most such documents are open to the public after 30 years, many types of documents which can be classed as Cabinet documents are routinely made public; for example, approved draft legislation, regulations, and nearly all orders-in-council. These, however, are legal documents that require publication to take effect. Even those documents that do not need to be made public, such as policy papers and background studies, are often released at the discretion of ministers. For the most part, however, Cabinet documents are shrouded in secrecy.

Before reviewing the various types of documents that could be classed as "Cabinet documents," some understanding of the reasons why these documents have been traditionally kept secret should be explored.

From British constitutional practice, we have inherited the convention

173 Australia, Senate, Freedom of Information Bill (1978) s. 26.

174 Bill C-15, s. 22(1).

of collective ministerial responsibility which consists of the principle that ministers are collectively responsible for all the actions and policies of the government as a whole.¹⁷⁵ When ministers sitting as the Cabinet make policy, they are responsible to the legislature for that policy and its implementation, and when the legislature votes no confidence in the government on an assessment of its performance, the government is expected to resign. A corollary to this general principle is the further principle that because all ministers are expected to accept responsibility for Cabinet decisions, each minister, whether he agrees with the final decision or not, must publicly defend that decision. There must be the appearance of Cabinet solidarity and unity. If a minister cannot publicly support his Cabinet colleagues, it is expected that he will resign.¹⁷⁶ For this convention to operate effectively, Cabinet discussions need to be secret so that ministers may express their views in an atmosphere of candour which affords those opposed to any given policy the freedom to debate with their colleagues. To open up Cabinet discussions to public scrutiny would inhibit such frank exchanges of views, and would readily allow the identification of dissident ministers. The result could be political instability and the sense that there was no definite government policy but merely a cacophony of opposing views. The public, as well as the legislature, would be hard pressed to hold all ministers

175 Sir Ivor Jennings, The British Constitution, 4 ed. (Cambridge, 1971) 145.

176 S.A. de Smith, Constitutional and Administrative Law (Harmsworth, 1977) 168.

responsible for government policy under these circumstances. If there is a clear public interest in holding ministers collectively responsible, then Cabinet discussions should be protected as a general rule from continuous public scrutiny.

What documents should be protected on the basis of this rationale for Cabinet secrecy? This question can, perhaps, be best answered by a review of the types of documents that could be classed as "Cabinet documents." Two broad categories of documents may be considered to belong to this class: those generated by Cabinet and its committees and are in the custody of the Cabinet Office or in the offices of ministers, and those documents created outside the Cabinet system which are sent to Cabinet for consideration. The first category would contain material such as informal and formal minutes, records of decisions, agendas, draft versions of legal documents (i.e., statutes, regulations and orders-in-council) and policy background papers prepared by the Cabinet Secretariat. Except perhaps for the latter type of document, all the others are clearly Cabinet documents since they are generated by Cabinet and its committees and reflect the Cabinet's decision-making processes. On the other hand, reports prepared by policy advisors to Cabinet and its committees may not strictly fall within this category, since they may be technical in nature or contain a large factual content. To the extent that they provide background information only, they may not directly reflect the Cabinet's decision-making processes.

Under the proposed Canadian federal Freedom of Information Bill, this first category of Cabinet documents would be exempt from access for a period of 20 years, unless authorized for release by the Prime Minister. The exception to this rule are background papers prepared by the Cabinet Secretariat, for example, which would be made accessible once Cabinet had reached a decision on the matter.¹⁷⁷ This is not the approach taken by the Australian federal Bill. It creates no distinction between Cabinet documents and background documents,¹⁷⁸ though an Australian Senate Committee has recently recommended that such a distinction be made.¹⁷⁹

The other category of Cabinet document consists of those sent to or received by Cabinet and its committees from outside sources, either from ministries or other agencies of the government or from the private sector. Perhaps the most important type of document in the Ontario context in this category is the official Cabinet Submission, a document prepared in a prescribed format with the designation "Confidential Cabinet Submission" on each leaf. When ministries are ready to take their policy proposals to Cabinet, their arguments, options, alternatives and recommendations are embodied in formal Cabinet Submissions. Once such documents have found their way to

177 Bill C-15, s. 21.

178 Australia, Freedom of Information Bill, s. 24.

179 Australia, Senate, Committee on Constitutional and Legal Affairs, Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978, (Canberra, 1979), 207.

Cabinet, there can be little disagreement over their belonging to the class of Cabinet documents. However, there may be copies remaining in the ministries as well as draft versions typed on ordinary paper. Further, there may be copies in the ministries of memoranda, reports or studies which have been reproduced and attached to formal Cabinet Submissions. Usually, such attached material contains explanatory details on some point or issue, or provides background information and factual data. Such documents may have been, in their initial stages, intended to ultimately be included in a submission to Cabinet. Further, the ministries will possess many documents containing information which has in fact found its way into a Cabinet Submission. Should all or any of these documents be considered as falling within the class of Cabinet documents? If the answer is affirmative, conceivably every type of document, including factual ones, even remotely connected to the policy process could be classed as a Cabinet document.

Faced with the same general problem the Australian draft Bill includes within the class of Cabinet documents only those that have been submitted to Cabinet for a decision, or those that have been so proposed by a minister.¹⁸⁰ Assuming that the concept of Cabinet documents is restricted in this way to formal submission material, it may still be asked whether all such must remain indefinitely exempt from access. Certainly as far as factual material is concerned, any sensitivity

180 Australia, Freedom of Information Bill, s. 24.

it might have while the matter is under active consideration by Cabinet is very much reduced. This no doubt is the reason underlying the current practice in Ottawa -- to be described in the next section of this chapter -- under which such material is disclosed once a final decision has been made and announced by Cabinet.

The proposed Canadian federal law follows the Australian approach with respect to documents containing proposals or recommendations that are either prepared for or submitted to Cabinet by a minister.¹⁸¹ Such a definition would appear to leave documents other than Cabinet submissions per se to be dealt with on the basis of a general rule that documents containing advice, as opposed to factual material, should be exempt from access.

Finally, consideration should be given to the question of documents in the possession of a minister. If a freedom of information statute would not apply to the legislature, ministerial documents reflecting a minister's legislative work would not come within the scope of the legislation, nor would those documents pertaining to his partisan political activities and his constituency work. In addition, if there were an exemption for Cabinet documents, then those in the possession of a minister that reflected Cabinet deliberations and consultations with other ministers would be exempt from access. On the other hand, documents which touched on the affairs of his legal and administrative

181 Bill C-15, s. 21.

responsibilities as head of a ministry or department, would not be exempt so that his office could not be used as a "haven" for documents not otherwise exempt from access. This is the approach followed by both the Canadian and Australian Bills, though only the Australian Bill makes this an explicit provision.¹⁸²

G. Facts and Opinions

Much of the discussion relating to access to policy documents centres on a fact-opinion distinction. For reasons cited previously, particularly with respect to the issues of "frank advice" and civil service anonymity and neutrality, opinions, advice and recommendations are protected from disclosure in various freedom of information legislation. On the other hand, because there is no broad interest to be protected if disclosed, factual material should be made publicly accessible. This approach is embodied in the Australian draft Freedom of Information Bill, the American Freedom of Information Act and the proposed Canadian federal Bill.

There is, however, some difficulty with documents that are a mixture of fact and opinion. American courts have ruled that such documents must be made publicly available only if it is feasible to delete the

182 Australia, Freedom of Information Bill, s. 9(b).

opinions and advice from the document.¹⁸³ This principle of severability is explicitly adopted in the proposed Canadian federal Bill.¹⁸⁴

A practical solution to the problem of separating the facts from the opinions in policy documents would be to prepare two different types of documents -- those that contain factual material and those that contain advice and recommendations. This approach has been adopted to some extent in the United States. At the federal level in Canada, in 1977 the government introduced a system of this kind with the requirement that two types of documents be prepared for Cabinet Submission: Memorandum to Cabinet and the Discussion Paper. The former is short and summarizes the problem and the decision required, including any sensitive political considerations bearing on the issue as well as the author's recommendations. The Discussion Paper, on the other hand, can be quite long and contains an extensive and comprehensive discussion of the issue and alternative proposals. It does not, however, contain conclusions or recommendations, nor as far as possible any politically sensitive material.¹⁸⁵ The proposed Canadian federal Bill recognizes the existence of such a system with respect to those documents prepared for Cabinet that contain background

183 Christine M. Marwick, ed., Litigation under the Amended Federal Freedom of Information Act, 3rd ed., (Washington, D.C., 1977) 34.

184 Bill C-15, s. 26.

185 Richard D. French, "The Privy Council Office: Support for Cabinet Decision-Making," in R. Schultz, O.M. Kruhlak, and J.C. Terry, The Canadian Political Process, 3rd ed., (Toronto, 1979), 370.

information. Such background materials, as Discussion Papers, are publicly accessible once Cabinet has made a decision with respect to the matters raised in the documents.¹⁸⁶

In the course of this study, Ontario civil servants were asked whether they thought such separation possible. While in principle they raised no objection, they did express the view that in relation to past documents, the process of culling them to separate fact and opinion would prove time-consuming and expensive. With respect to future documents, some indicated that their work would increase if they were required to produce two documents, and that they would prefer to have policy documents contain both factual and advisory material.

In this discussion of advice and whether it should be exempt from access, further consideration must be given to the source and nature of that advice. The Australian draft Bill proposes that advice and opinions not generated by the internal deliberative process involving the senior levels of the public service and the ministers, need not be exempt. Thus, reports prepared by scientific and technical experts which express advice or opinions on technical matters are not exempt from public access.¹⁸⁷ This same approach is adopted by the proposed Canadian federal Bill.¹⁸⁸

186 Bill C-15, s. 21(1)(f).

187 Australia, Freedom of Information Bill, s. 26(4)(a).

188 Bill C-15, s. 20; there are, however, some qualifications to this rule.

To indicate the kinds of documents that would ordinarily be available on the basis on the fact-advice distinction under the proposed Canadian federal Bill, the following list was prepared as a guide by the President of the Privy Council:

- . factual material of all kinds
- . consultants' reports
- . program evaluations and assessments
- . documents stating and explaining policies
- . test reports, environmental impact statements, product testing results
- . technical and scientific research results and results of field research
- . statistical surveys
- . opinion survey results
- . feasibility studies
- . cost figures and estimates
- . field reports, reports on operations, documents on the administration
- . organization charts
- . salary ranges of officials
- . details of contracts
- . terms of reference for any work contracted out or for studies of departmental programs.

189

H. Financial Information

Frequently, the Ontario government makes policies and takes actions that have some economic impact on segments of the community or the citizens of the province as a whole. The budgetary process, which will be considered in the next section of this chapter, is an obvious illustration of this phenomenon, but there are numerous less complex decisions with consequences of this kind. Two simple illustrations will be helpful: the creation of a new public park would involve the purchase of necessary land; upward changes in the sales tax would affect both consumers and retailers. In the first case, public money would need to be expended to cover the cost of the land, while in the second case government would expect additional revenues to flow to the Treasury. In contemplating such actions, officials would seek to minimize costs and maximize revenues.

There is an obvious public interest in permitting public officials to pursue such objectives. Conversely, any actions which could lead to government paying out more public money than necessary, or receiving less in revenues than anticipated or projected, could be said to be contrary to the legitimate interests of the province. To achieve these objectives for the government, it may be desirable to prevent groups or individuals from receiving private gain at the public's expense, or to prevent financial speculation and loss of revenue to the Treasury, by avoiding premature disclosure of such proposals. Although the drafting of an exemption to meet this difficulty may pose problems, a useful

model is provided in the Minority Freedom of Information Bill prepared under the auspices of the Royal Commission on Australian Government Administration.¹⁹⁰ It specifies in some detail the types of documents whose premature release could lead to an adverse impact on the government's legitimate economic interests, or documents that could lead to disadvantage for the government or its agencies in various types of financial negotiations. It may be added that this latter course is followed by the proposed Canadian federal Freedom of Information Bill.¹⁹¹

I. Budget Secrecy

The budgetary process in Westminster-style parliamentary systems has been traditionally surrounded by secrecy. Deliberations are closed and documents are confidential, and if the Treasurer seeks advice outside government it is always confidential, informal, privileged and at his discretion. In recent years, however, such secrecy has been criticized both in Canada and abroad. In Britain, an exhaustive public expenditure survey is conducted by government that includes expenditure estimates for a five-year period. This framework, with the assistance of appropriate functional and economic breakdowns, provides information required to assess the potential for government demand management as

190 Appendices to Report, Vol. II (Canberra, 1976) 45-46.

191 Bill C-15, s. 18.

well as for raising questions of priorities among government programs and expenditures. Such case studies are published as White and Green Papers and are debated in Parliament.¹⁹² Even in the United States, which because of the separation of powers has a far more open system of government, Congress has instituted new budgetary procedures and created new bodies like the Congressional Budget Office in an effort to open up the budgetary process to closer public scrutiny.¹⁹³

In Canada, similar interest has been expressed in opening the budgetary process to public participation and scrutiny. The Business Council on National Issues, formed in 1976 by 140 officials of national corporations, has recommended that the federal Parliament, through its committees, "hold hearings on the budget before it is presented to Parliament, to receive testimony from the government's financial officers, and to entertain submissions from bodies like the Economic Council of Canada." Moreover, it "urges that the Finance Minister and the President of the Treasury Board publish an annual White Paper revealing planned expenditures for the next five years."¹⁹⁴ Similar but more detailed recommendations were made by the Royal Commission on Financial Management and Accountability.¹⁹⁵ In addition, the Canadian Tax Foundation has taken a keen interest in the issue and has

192 See, Information and the Public Interest, Cmnd. 4089 (June, 1969).

193 For analysis of the impact of these reforms, see Aaron Wildavsky, The Politics of the Budgetary Process, 3d ed. (Boston, 1979) c. 7.

194 Editorial, Globe and Mail (May 14, 1979).

195 Royal Commission on Financial Management and Accountability, Final Report (March, 1979) 381-383.

called for openness in order to facilitate informed public discussion.¹⁹⁶

It has also reviewed the manner in which tax policy is set and has determined that existing parliamentary institutions, particularly a designated standing committee of the House of Commons, could be used as forums for public debate.¹⁹⁷

While it is unlikely that complete openness of the budgetary process can or needs to be achieved, the existing secrecy surrounding that process could be lifted by the adoption of the recommendations cited above.

J. Information Relating to
Intergovernmental Affairs

In our federal system of government, very few areas of governmental activity do not involve federal-provincial cooperation or, at least, discussion. To exempt from public access all material relating to intergovernmental affairs would thus seriously inhibit a general policy of encouraging public access to government information. There are, however, some difficulties involved in making all such material accessible.

196 D.J. Sherbaniuk, "Budget Secrecy," *Canadian Tax Journal*, XXIV, no. 3 (May-June, 1976); also see The Tax Legislative Process Committee (Canadian Tax Foundation), "The Tax Legislative Process," *Canadian Public Administration*, 21, no. 3 (fall, 1978), reprinted from *Canadian Tax Journal* (March-April, 1978).

197 The Tax Legislative Process Committee, *ibid.*

In dealing with other government jurisdictions, either federal, provincial or municipal, Ontario officials often engage in various types of negotiations. It may be argued that public access to documents supporting such negotiations would place officials at an undesirable disadvantage. At the municipal level, the issue is relatively uncontentious. The province has sought to make provincial-municipal negotiations as open as possible. The province now routinely discusses proposed legislation and policies with the municipalities before such matters are introduced in the legislature, and conducts meetings in public. This consultative process takes place through what is known as the Provincial-Municipal Liaison Committee, which consists of ministers and representatives of various municipal associations.¹⁹⁸

Officials of the Ministry of Intergovernmental Affairs indicated that no serious problems of confidentiality have arisen in connection with this open process. Where necessary, the provincial government will consult with representatives of municipalities in camera; for example, when they wish to discuss particularly sensitive financial matters, the Fiscal Arrangements Sub-Committee of the Provincial-Municipal Liaison Committee meets in private. Provincial officials assume that material shared with municipal representatives may be made public by

198 The origins of this Committee and its functions are described by A. O'Brien, "Father Knows Best: A Look at the Provincial-Municipal Relationship," in MacDonald, op. cit.

the latter, and nearly all documents relating to provincial-municipal relations are considered available for public scrutiny, with the exception of certain ministerial correspondence with individual municipalities on sensitive issues. The officials interviewed indicated that their basic procedures and practices would not be affected if this informal policy was embodied in legislation.

Negotiations with other provincial governments and the federal government are conducted quite differently. The actual negotiations as described by officials are characterized by candour and informality, which would be destroyed if all relevant documents pertaining to those negotiations were made public before or during the actual meetings.

While to the extent that federal-provincial relations involve detailed negotiations, secrecy may be justified, the same cannot be said of other matters that fall into this policy area. Increasingly, federal-provincial conferences are used as "a setting for basic debate about the nature of Canadian federalism and broad policy options"¹⁹⁹

To the extent that these conferences are used as forums of this type, it may be argued that the proceedings should be as open as possible. Further, there is obviously a public interest in access to documents that reflect these broad issues of public policy. To the extent that

199 R. Simeon, "The Federal-Provincial Decision-Making Process," in Ontario Economic Council, Intergovernmental Relations (1977) 30.

federal and provincial governments already make such documents publicly accessible, such a policy should be encouraged. Any possible exemption relating to intergovernmental relations that may be contemplated in a freedom of information statute should be so worded as not to hinder the release of these documents.

K. Legal Advice

Documents containing legal advice are treated by Ontario officials as confidential on the basis of "lawyer-client privilege." Whether every document or opinion prepared by a government lawyer falls or ought to fall within the bounds of this privilege is open to question. Legal opinions provided in connection with pending litigation undoubtedly come within the scope of this privilege; on the other hand, opinions from government lawyers may be sought with respect to many areas of proposed public policy, from matters dealing with constitutional negotiations to specific issues of law reform. It seems doubtful that documents relating to these matters written by government lawyers could be construed as falling within the ambit of lawyer-client privilege. Whatever the precise scope of the privilege, however, it is one which could be surrendered by the government to a policy of general access to documents if it was felt desirable so to do. The critical question, then, is whether the interest in confidentiality reflected by the privilege should also be protected under an access scheme.

As far as documents that provide advice with respect to impending or ongoing litigation or various negotiations are concerned, a strong argument can be made that a legislated access scheme should not interfere with lawyer-client privilege. The public has an interest in the government being able to effectively assert its legal position. The taking of legal advice in confidence may assist it in doing so.

As far as more general policy advice is concerned, however, the problem does not seem to differ from the general question of exempting policy advice, which has been discussed above. Indeed, there may be some difficulty in distinguishing "legal" policy advice from other kinds of advice. Moreover, it may be difficult to segregate documents containing exclusively "legal" material. Consider, for example, the activities of the Office of the Legislative Counsel in relation to draft legislation and regulations.²⁰⁰ Drafting legislation not only involves the application of legal technical skills, but also reflects the policy process at the Cabinet level. Before the final wording of legislation is decided, various draft versions are circulated and discussed by Cabinet ministers in the full Cabinet and in various Cabinet committees, especially by the Committee on Legislation, and in the case of regulations, by the Committee on Regulations. Any changes, alterations or amendments as these reflect modifications in policy development are revealed in draft versions of the legislation. Some

200 The general policy role of Legislative Counsel is explored by W.H.R. Charles, "Public Policy and Legislative Drafting," in Neilson and MacPherson, The Legislative Process in Canada.

changes may reflect ministerial thinking, others may reflect the advice of the Legislative Counsel. If such material is to be exempt from public access, it seems likely that the reason for doing so is because the documents contain advice or reflect Cabinet deliberations rather than because they involve "legal" matters.

L. Submissions, Briefs or Letters

Individuals or organizations often send submissions, briefs of letters to government officials -- civil servants or ministers -- with an implicit or explicit political motive to influence government policy-making in a direction desired by the individual or organization. There are a number of reasons why such documents should be made publicly accessible. Were these submissions, briefs and letters available to the public, the quality of public debate relating to proposals for government action would improve, inasmuch as arguments and alternative policy proposals would be fashioned in the knowledge of what others were arguing and proposing. Further, access to such material would be of assistance to those wishing to understand the problems to which a particular governmental program was addressed, or to those wishing to identify problems involved in the administration of existing programs. Finally, it may be argued that public confidence in the fairness of governmental policy-making would be enhanced by the granting of access to such documents.

On the other hand, there may be compelling interests requiring the entire submission or some portion of it to be exempt from access. A list of such interests would include: information of a personal nature which, under a freedom of information statute, would be protected from disclosure by an invasion of privacy exemption; trade secrets or other commercial or financial information which, if disclosed, would harm the organization's competitive position; and finally, other information which would not be disclosed to the government unless undertakings of confidentiality were given.

M. Public Opinion Polls

Recently, the subject of public access to government-sponsored public opinion polls has been the subject of debate in the Ontario legislature. Mr. Patrick Reid, MPP, had sought access to several such polls only to learn that government policy precluded the release of the results.²⁰¹ The principal argument for public access to these polls is that this would help to inform debate on the matters canvassed in these surveys. If this information -- essentially factual information concerning public attitudes -- is of interest to the government, it would be of interest to others as well. The fact that these polls are currently not released can create the suspicion that the government is using them for

201 See Communique issued by Mr. Patrick Reid, MPP (July 26, 1978).

partisan political purposes. Whatever the real motive for their use by government, the fact that they are scientifically-based research studies funded by Ontario taxpayers is a compelling reason why they should be made publicly accessible.²⁰²

N. Consultants' Reports

As was previously indicated, consultants provide a wide range of services to government, from reviewing internal administrative practices to giving policy advice. The question of public access to their reports is now in the discretion of ministers. Current practice is to treat them much in the same way as civil servants' reports are treated. It is arguable, however, that consultants' reports should be accorded a different treatment. The major reasons for the confidentiality of the advice of public servants -- the principles of civil service anonymity and political neutrality -- simply do not apply to reports prepared by outside consultants. A minister would not be placed in a position of having to defend the views of consultants, as he would his own civil servants were such reports made publicly accessible. Nor can a persuasive argument be made that if consultants' views, opinions or recommendations were made public, consultants would cease giving advice. Their livelihood depends on selling their expertise.

202 The Ontario Committee on Government Productivity stressed "the need for immediate access by the public and all political parties to such studies" Interim Report Number Seven, 33.

On the other hand, it is conceivable that a consultant's opinions or recommendations may be the source of some political embarrassment to ministers if these opinions conflicted in some way with government policy or potential government policy. Against the possibility of such embarrassment must be weighed the benefits accruing from a policy of disclosure. Professor Donald Smiley has argued that access to consultants' reports would help redress the informational imbalance between government and its critics, and would improve the quality of those reports.²⁰³ It is of some interest to note that under American legislation, such reports are made available.²⁰⁴ The proposed Canadian federal Bill has also adopted a similar position.²⁰⁵

203 Smiley, op. cit., 68-69.

204 Under Title 5, U.S.C. s. 552(b) (5), only documents prepared within an agency are protected.

205 President of the Privy Council, Press Release (October 24, 1979) 4.

CHAPTER VII

CONCLUSIONS

On the available evidence, there would appear to be no overall policy guiding the granting of public access to policy documents generated and held by the Ontario government. In the absence of any clear policy, requests for information or documents are dealt with on an ad hoc basis, often with the use to which the information will be put as an important consideration in the ultimate decision about release. Wide discretion is permitted, leading often to inconsistency and arbitrariness in deciding what documents or information to release and to whom. While the civil servants interviewed believed more information could be made publicly accessible without harming the policy process, they felt constrained by the lack of a clear policy and by the provisions of the Oath of Secrecy. The Oath, stipulating that civil servants should not reveal information or documents unless legally required, is an admonition which is violated daily. Yet, to the extent that it constitutes the only clear guideline, it forces civil servants to review requests for information or documents with deliberate caution. All civil servants interviewed agreed that if a clear information access policy were formulated, it would be of assistance to them in their work and of benefit to the interested public. Junior civil servants are particularly uncertain about the

limits of their authority, and senior officials spend a considerable amount of time familiarizing themselves with the details of requested material which has been referred to them for decision.

The arguments presented in this report lead to the conclusion that a legislative scheme would best resolve the ambiguities and inconsistencies of the existing ad hoc method of providing public access. Moreover, if a legislated scheme were introduced in Ontario, it would best serve the policy process if it incorporated the following principles:

- 1) There should be a general public right to all information that may be generated by the policy process.
- 2) If there are to be exemptions, and the preceding chapter argues that there is a need for exemptions, these should be narrowly drawn. Further, whatever form the exemptions ultimately take, they should be so drawn as to permit public access to exempt material wherever the public interest would not be harmed by its release.
- 3) More specifically, any scheme of exemptions relating to policy documents should require factual material to be made publicly accessible.

4) Documents containing advice, opinions or recommendations which form the immediate basis for decision-making might be exempted for a designated period of time.

5) Only a narrowly defined category of Cabinet documents should be exempted as a class.

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Research Publication 1

by Prof. Donald V. Smiley, York University \$2.00

Freedom of Information and Ministerial Responsibility

Research Publication 2

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